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The Design of Compensation Systems: Tort Principles Rule, O.K.?

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The Ninth Monsanto Lecture

THE DESIGN OF COMPENSATION SYSTEMS: TORT PRINCIPLES RULE, O.K.?

RT. HON. PROFESSOR SIR GEOFFREY PALMER*

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In early 1994, the writer was appointed by the Minister for Accident Rehabilitation and Compensation Insurance in New Zealand, the Hon. Bruce Cliffe, as one of a small group of persons to advise him on accident compensation. It is important to stress that nothing in this article is attributable either to the New Zealand Government or the Minister.

I am grateful for comments on earlier drafts by my colleagues, Professors Kenneth Kress and Michael Green. Needless to say, they cannot be held accountable for any of the heresies which abound here.

SYNOPSIS

In the 1994 Monsanto Lecture, Professor Sir Geoffrey Palmer argues that the New Zealand experience in abolishing tort law as a method of compensating personal injuries contains some lessons for the United States. The common-law tort action for damages was removed twenty-one years ago in New Zealand. Despite its removal, the common law exerts a powerful influence on the statutory scheme substituted for it. Common-law analogies speak to both coverage of the scheme and the benefits. This conclusion is counter-intuitive. It might have been anticipated that after more than twenty years the influence of the common law had been forgotten, allowing the whole issue to be dealt with on the basis of an integrated and comprehensive income-maintenance scheme. So long as the scheme in New Zealand is confined to accidental injuries, that will not be possible.

Recent legislative changes to the New Zealand scheme have opened up the possibility of common-law actions again in some areas, conspicuously nervous shock. The range of these changes is analyzed here. The law relating to nervous shock is analyzed both at common law and under the New Zealand scheme to try to determine the range of policy options available for handling what is admittedly a difficult problem.

A reduction in both coverage and benefits in the New Zealand scheme since 1992 has caused a demand for return to the common law. The New Zealand policy is currently undergoing further revision. It appears likely that the common-law analogies in areas like nervous shock will demonstrate again the necessity of ensuring that the statutory scheme follows the baseline of protection provided by the common law. The New Zealand experience further suggests that it is impossible to ignore elements of pain and suffering altogether, as intangible losses represent real human values.

For United States reformers, the New Zealand experience suggests that it is not practicable to offer in the United States substitute schemes comparable to the American common law. The American level of awards for non-pecuniary loss, the contingent fee, the vagaries of trial by jury, the relatively liberal availability of punitive damages, and community hostility toward centralized state control of substitute schemes that would keep the administration costs down, suggest that reform efforts based on the offering of substitutes will never succeed. Yet, the American tort system appears to be an expensive, incoherent mess about which little positive can be said. Society would be better

off without it.

Thus, the conclusion reached here is that the United States tort system should be abolished for personal injury, and no statutory scheme should be substituted. That would allow for many and various creative private responses to fill the gap. It would in effect mean starting again with the accident problem. In the end, that will produce better solutions than the existing tort system which appears to achieve no goal whatsoever with any consistency or focus. Without some change in direction, American reformers will achieve little in the foreseeable future. The tort system will limp along, the object of obloquy. It will mutate in strange new ways. Before anything good can happen, the beast must be slaughtered.

I. INTRODUCTION

A number of heroic assumptions must be made in order to find a place at which to start this lecture. For an American audience versed in tort law, the assumptions are particularly dramatic, even unpalatable. First, it is necessary to assume that there is little or nothing to be said in favor of tort law as a system for compensating personal injury, and it ought to be done away with in that connection. Secondly, it must be assumed that the necessary political resolve to carry out the first assumption exists and that tort law can actually be abolished, at least as a means of compensating personal injuries. In the United States, the second assumption may be even more unrealistic than the first. The first assumption is normative. The second assumption depends upon social and political facts. But reformers should never be deterred by unfavorable portents. It should encourage them only to redouble their efforts.¹

The literature over the past thirty years has catalogued serious infirmities in the tort system.² Many are now disposed to agree that it has a number of

1. One commentator has stated:

It must be considered that there is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order . . .

Niccolo Machiavelli, *The Prince*, in *THE PRINCE: AND, THE DISCOURSES* 21 (Luigi Ricci trans., E.R.P. Vincent ed., Mod. Library 1950) (1513).

2. Richard L. Abel, *A Critique of American Tort Law*, 37 U.C.L.A. L. REV. 785 (1990). See also PETER CANE, *ATTYAH'S ACCIDENTS, COMPENSATION AND THE LAW* (5th ed. 1993); TERENCE G. ISON, *THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY AS A SYSTEM OF PERSONAL INJURY COMPENSATION* 205-10 (1967); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967). See also STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR*

unsatisfactory features. Not only does the system exhibit some grave problems from the point of view of social principal, it also has practical problems which have led, at various times in recent American history, to what is sometimes described as a state of "major crisis."³ Liability insurance rates have escalated and industry protests have been vociferous.

The early attack on the system focused on liability for motor accidents, and the no-fault insurance movement had considerable success in removing tort law, at least partially, in about half the States. Serious problems have arisen in the area of medical malpractice and product liability. There has been substantial legislative tinkering with some of the internal rules of tort law in an attempt to dampen the excesses of the system.⁴

American tort law has long been a social battleground. However, the battle has shifted in recent years from a series of analytical difficulties about the internal constructs of tort law to an analysis of its problems as judged from an exogenous point of view. While suing people may be as American as apple pie, its social costs and disadvantages have become so evident that the thought of prohibiting it, or at least limiting the right to sue, is no longer unthinkable.⁵

To those who dream in the United States of designing a substitute with which to replace the tort system, I offer no optimism. Formidable difficulties lie in reformers' way. The journey to that destination will be interrupted by a series of formidable design problems for the replacement compensation system. Many of those difficulties have their origins in the tort system itself. The

VICTIMS, CONSUMERS, AND BUSINESS (1989). See generally ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM; A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965); JEFFREY O'CONNELL & C. BRIAN KELLY, THE BLAME GAME (1987); DONALD HARRIS ET AL., COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984); JANE STAPLETON, DISEASE AND THE COMPENSATION DEBATE (1986); PETER SHUCK, TORT LAW AND THE PUBLIC INTEREST (1991); Don Dewees et al., Tort Law and Its Alternatives: Taking the Facts Seriously (mimeograph, 2 vols. 1992).

3. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1 (1987); 1 AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 3 (1991). See also *Symposium on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 213-443 (1993). See also PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) (providing an alarmist account); W. John Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 TEMP. L. REV. 459 (1992).

4. Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

5. Kenneth S. Abraham, *What Is a Tort Claim? An Interpretation of Contemporary Tort Reform*, 51 MD. L. REV. 172, 172 (1992) ("In short, tort law is in considerable turmoil and there is no end in sight.").

American designers of new compensation systems have never ignored the configuration of the tort system, for it is that system they desire to replace. This article suggests that perhaps that approach has been misguided.

My ultimate conclusion for American tort reformers is that their focus needs to be changed. They have not been able to achieve a community consensus that the tort system as a method of compensating personal injury is inferior to any of the substitutes proposed. This leads me to the conclusion that a fundamental reappraisal of the efforts at reforming American tort law needs to be undertaken. It is time to reform the reformers. Tort law does not achieve its purposes. Alternative arrangements should be established.

More than twenty years ago, New Zealand eliminated tort as a means of compensating personal injury. As a person involved with the design of the replacement scheme, I wish to offer an analysis which demonstrates what an enduring influence tort law exerts on the replacement scheme. I do not suggest that anything which happens in New Zealand is relevant to the United States. However, the various texts used for teaching torts in the United States contain extensive treatment of New Zealand's system of accident compensation, which has abolished tort law as the means of compensating personal injury.⁶ While a common-law country like New Zealand took this path twenty years ago and has not been emulated, it has attracted interest.

After more than twenty years, there are now lessons for American reformers from the New Zealand experience, and in particular from the recent experience of revising the New Zealand design.⁷ New Zealand enacted its scheme in 1972 and it was re-enacted with revisions in 1982. In 1992, extensive changes were made to the scheme. These revisions have proved to be

6. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 990-1000 (5th ed. 1990); JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 811-16 (4th ed. 1994); GEORGE C. CHRISTIE & JAMES E. MEEKS, *CASES AND MATERIALS ON THE LAW OF TORTS* 853-55 (2d ed. 1990); DAN B. DOBBS, *TORTS AND COMPENSATION* 791 (1985); MARC A. FRANKLIN & ROBERT L. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 787-93 (5th ed. 1992); WILLIAM L. PROSSER ET AL., *TORTS—CASES AND MATERIALS* 1209 (9th ed. 1994); W. PAGE KEETON ET AL., *TORT AND ACCIDENT LAW* 899 (2d ed. 1989). Professor Richard Miller, an American from the University of Hawaii, has written on the New Zealand scheme, although to New Zealand eyes some of his insights seem odd. See Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 5 CANT. L. REV. 1 (1992); Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 52 MD. L. REV. 1070 (1993).

7. Geoffrey Palmer, *New Zealand's Accident Compensation Scheme: Twenty Years On*, 44 U. TORONTO L.J. 223 (1994). See also Geoffrey Palmer, *The New Zealand Experience*, 15 U. HAW. L. REV. 604 (1993); Geoffrey Palmer, *What Happened to the Woodhouse Report?*, [1981] N.Z.L.J. 561. See generally GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* (1979).

unacceptable to the public. They have excited substantial controversy and further changes to the scheme are in the process of formulation. These changes will no doubt improve the benefits and coverage of the scheme which were cut back in 1992. Furthermore, twenty-one years after the reform in New Zealand, the memory of the common law, while fading, is not dead. The extent to which the common-law action for damages governs the policy design in New Zealand will turn out to be an important matter in the political decisions which are being made now in New Zealand to revise the scheme.

II. THE RANGE OF COVERAGE

A central purpose of the accident compensation scheme in New Zealand was to eliminate court actions for damages arising out of personal injury by accident. The targets of that policy were several.⁸ It was thought that the action itself was wasteful, consuming great resources and returning valuable benefits to only a minority of accident victims. Court actions impeded efforts to rehabilitate those accident victims who did recover. The transaction costs of the system were enormous—it cost about forty cents to deliver sixty cents in benefits. Additionally, the courts were clogged with personal injury actions which could more easily be dealt with by administrative means. Large numbers of accident victims went without any compensation from the common-law system, and there were long delays in delivering the benefits to those who eventually received anything. Moreover, in New Zealand, compulsory liability insurance had blunted or removed whatever deterrent effect tort law may have had. Further, the assessment of damages in one lump sum involved guesswork and speculation. Damages tended to overcompensate less serious injuries. In addition, the process of adjudication was a lottery: who would be able to prove negligence and who would not? There were strong incentives to maximize misery. In short, accident prevention was impeded by the entire system.⁹

A policy based on those imperatives determined the boundaries of the new scheme. If some common-law actions survived the introduction of the scheme but others did not, there would be clear injustices created between the two classes of accident victims: those who still had common-law claims and those who did not. It would not take long, the designers thought, for the public to object to such artificial distinctions should they survive. It was apparent from this simple proposition that substantial cracks in the scheme could be opened up, should the range of events covered by the common law action for damages be significantly wider than the coverage afforded by the accident compensation scheme, which was a substitute for the common law. Accordingly, the coverage

8. REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (Dec. 1967).

9. *Id.* at 42-62.

of the New Zealand scheme has been, from its inception until the present day, wide, but not as wide in 1994 as it was in 1973.¹⁰

Section 5 of the Accident Compensation Act of 1982, which in its essential features was the same as its predecessor, declared:

Act to be a code—[1] Subject to this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.¹¹

Since the coverage afforded by these provisions amounted to twenty-four hour coverage for all accidents occurring anywhere in New Zealand, it is instructive to examine how the courts dealt with arguments about the limits of the statutory bar.

A. Cases Where It Was Argued that the Damages Did Not Arise Directly or Indirectly Out of Personal Injury by Accident

Exemplary damages, or punitive damages as they are sometimes called, were never as readily available in New Zealand and English law as they have been in the United States. Under a leading House of Lords decision, exemplary damages are restricted to a number of exceptional situations.¹² However, this decision was not followed in a later Privy Council decision on appeal from Australia.¹³

The House of Lords held that the award of exemplary damages was restricted to either circumstances where they were expressly authorized by statute, or where they were necessary to either deter oppressive, arbitrary, or unconstitutional acts of government servants, or to prevent a tortfeasor reaping a calculated profit from his or her wrong. New Zealand authority seems to

10. In the history of the scheme there have been three separate statutes: the Accident Compensation Act 1972, the Accident Compensation Act 1982, and the Accident Rehabilitation and Compensation Insurance Act 1992.

11. Accident Compensation Act 1982, § 5.

12. *Rookes v. Barnard*, 1964 App. Cas. 1129.

13. *Australian Consol. Press v. Uren (Thomas)*, [1969] 1 App. Cas. 590 (P.C. 1967) (appeal from Austl.).

suggest that exemplary damages may be available in a wider range of circumstances than suggested by the House of Lords, at least where the wrong is committed "with the utmost degree of malice or vindictively, arrogantly or high handed with a contumelious disregard for the plaintiff's rights."¹⁴ An award of exemplary damages has been upheld in New Zealand where an innocent family photograph of the plaintiff and her granddaughter was published without authorization in a sex manual.¹⁵ Thus, in New Zealand, as in Australia, exemplary damages "survive as a mark of public censure against egregious misconduct."¹⁶ But the availability of these damages is far more restricted in New Zealand than in the United States.

The relationship of exemplary damages to the accident compensation scheme in New Zealand was settled by the New Zealand Court of Appeal in 1982.¹⁷ The Court of Appeal held that exemplary damages do not arise directly or indirectly out of personal injury by accident, but rather from the conduct of the defendants. Thus, claims for exemplary damages were not barred by the accident compensation legislation.

Some might infer from this decision that tort claims for nominal damages arising from those torts which are actionable per se—assault, battery, and trespass—should not be barred by the scheme. The reason for such an inference is that the damage derives not from the fact of physical or mental injury, but from the committal of the tort itself. Such a claim, however, has been rejected by the New Zealand Court of Appeal.¹⁸

Surprising as it may be to Americans, the decision to allow exemplary damages to survive the accident compensation legislation has not led to an avalanche of litigation. In the case which established that punitive damages survived the Accident Compensation Act, the Court of Appeal warned that the courts would have to keep such awards within moderate bounds:

The Courts will have to keep a tight rein on actions, with a view to countering any temptation, conscious or unconscious, to give exemplary damages merely because the statutory benefits may be felt to be inadequate. Immoderate awards will have to be discouraged.

14. STEPHEN M. D. TODD ET AL., *THE LAW OF TORTS IN NEW ZEALAND* 871 (1991).

15. *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81 (C.A.).

16. JOHN G. FLEMING, *THE LAW OF TORTS* 241 (8th ed. 1992).

17. *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97 (C.A.). See also *Auckland City Council v. Blundell*, [1986] 1 N.Z.L.R. 732 (C.A.), where traffic officers, a species of government policepersons, had allegedly assaulted and battered the plaintiff, kicking him and jumping on his body on the ground.

18. *Re Chase*, [1989] 1 N.Z.L.R. 325, 329 (C.A. 1988).

Trial Judges will have to be clearly satisfied that the case is a proper one for considering exemplary damages, bearing in mind the kind of conduct which such damages are designed for, and not lightly to allow a claim to go to a jury. Cases of this kind are apt to raise difficult questions of mixed fact and law for which trial with a jury may not be appropriate; the present case is an example. Whether a case is one which may reasonably be considered fit for an award, and the level of damages, are matters which at times may have to be scrutini[z]ed carefully on appeal also.¹⁹

This warning has been heeded. There have been only a handful of reported cases. The circumstances in which punitive damages are available are considerably narrower than in American tort law. Different cultural norms of claims consciousness undoubtedly play a big role in the behavior of the various systems.

B. Cases Where There Has Been No Personal Injury

Early in the history of accident compensation in New Zealand, there were cases involving unwanted pregnancies which occurred due to failed sterilization attempts.²⁰ It was held that situations like this did not constitute "personal injury" under the Act. Thus there was no coverage under the Act. After changes were made in 1974, such as the inclusion in the scheme of a definition of medical misadventure, the importance of cases like these receded.²¹

A more difficult question arose from the provision in the legislation that "personal injury by accident" includes the "mental consequences of any such injury or of the accident." In the end, however, the courts refused to draw fine distinctions between the types of mental consequences, and claims for general damages based on indignity, distress, humiliation, and embarrassment arising from threats of physical violence which were held to be barred.²² That approach was followed by the Court of Appeal in a case where a woman developed cancer of the cervix as a result of the nontreatment that she deliberately received during an "unfortunate" experiment at National Women's Hospital. The Court held that her claims to compensatory damages, arising

19. *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97, 107 (C.A.) (Cooke, J.). *Donselaar* involved a dispute between two brothers, in which one assaulted the other with a hammer. The Court held that the particular case was not an appropriate one for exemplary damages.

20. *L v. M*, [1979] 2 N.Z.L.R. 519 (C.A.).

21. In 1974, the Act was amended to provide that "personal injury by accident" included "medical, surgical, dental or first aid misadventure."

22. *Dandoroff v. Rogozinoff*, [1988] 2 N.Z.L.R. 588 (H.C.). See also *Green v. Matheson*, [1989] 3 N.Z.L.R. 564 (C.A.).

from interference with bodily integrity, diminished life expectancy. The Court concluded that this, combined with the woman being subjected to research without her knowledge and consent, were all physical and mental consequences under the Act. Thus, the common-law claims were barred. In a more recent case, the Court of Appeal decided that mental trauma alone, which occurred in the form of a nervous breakdown during an intensive and rigorous management training course, amounted to personal injury sufficient to come within the coverage of the Act, assuming that the claimant had suffered personal injury by accident.²³

C. Cases Where There Had Been No Accident

One possible avenue of escape from the Accident Compensation Act was to argue that the claimant had not suffered an accident within the meaning of the legislation. That possibility was greatly reduced by a 1976 decision which held that whether a claimant suffered injury by accident was to be determined from the claimant's point of view.²⁴ Any injury that was fortuitous as far as the victim was concerned constituted personal injury by accident, even in circumstances where the injury may have been intentionally inflicted by another. That approach guided the decisions throughout the subsequent period.

Indeed, over time, the effect of Court of Appeal decisions in New Zealand was to expand somewhat the range of the scheme. A claim arising from mental injury suffered by a child following an unexplained cessation of breathing was held to be covered by the Act. This decision made it clear that the Act did not require personal injury to have occurred by a particular, identifiable accident, but simply "by accident."²⁵ The Court also held that the incident that was causative of the personal injury did not itself have to be unexpected or undesigned. It was sufficient if the result was "accidental." Indeed, a later case held that an identified external event giving rise to the injury was unnecessary.²⁶ Thus, internal and inexplicable accidents could come within the normal meaning of personal injury by accident in the view of the New Zealand Court of Appeal.

D. Cases Where the Cause of Action Was One in Which Personal Injury Is a Collateral Issue

The cases in which personal injury is a collateral issue are confused. In one case, the Court of Appeal indicated that damages claims arising from assault

23. *Accident Compensation Corp. v. E.*, [1992] 2 N.Z.L.R. 426 (C.A. 1991).

24. *G. v. Auckland Hosp. Board*, [1976] 1 N.Z.L.R. 638 (S. Ct. 1975).

25. *Accident Compensation Corp. v. Mitchell*, [1992] 2 N.Z.L.R. 436 (C.A. 1991).

26. *Accident Compensation Corp. v. E.*, [1992] 2 N.Z.L.R. 426 (C.A. 1991).

and battery would always be barred, although purists would argue that there may be no personal injury arising from, for example, a technical assault.²⁷ The better view may be that, where a claim for false imprisonment, a tort clearly beyond the range of the Act, was accompanied by a claim for physical injury arising out of the false imprisonment, a damages claim for the injury would be barred.

E. Cases Where Entitlement to Compensation Has Been Limited by the Legislation

A single New Zealand high court decision held that if compensation was not available from the scheme, an action for compensatory and aggravated damages would not be barred.²⁸ This statement, however, was based on an incorrect analysis of coverage under the Act. Coverage never guaranteed compensation in the New Zealand Accident Compensation Act. Rather, it meant that a claimant was eligible to be considered for compensation under the Act.

Despite the differences in the categories of cases analyzed above, there was really only one relevant question that courts needed to ask to determine the ambit of the Act. That question was whether a claimant had suffered damage arising out of a personal injury by accident. In making that determination, it is important to emphasize that the courts had wide discretion. The relative liberality of these decisions concerning coverage, however, combined with prodding by the scheme's administrators, persuaded the New Zealand government that it was necessary to restrict the range of the scheme. To implement that policy, the 1992 Act provides as follows:

Application of Act excludes other rights—[1] No proceedings for damages arising directly or indirectly out of personal injury covered by this Act or personal injury by accident covered by the Accident Compensation Act 1972 or the Accident Compensation Act 1982 that is suffered by any person shall be brought in any court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.²⁹

There are further explanatory provisions which make it clear that a person who has suffered personal injury is not necessarily entitled to any particular benefit.³⁰ In other words, coverage under the Act is not co-extensive with entitlement.

27. *Willis v. Attorney-General*, [1989] 3 N.Z.L.R. 574 (C.A.).

28. *Blundell v. Auckland City Council*, [1986] B.C.L. 531.

29. Accident Rehabilitation and Compensation Insurance Act 1992, § 14.

30. *Id.* § 14(2)(c).

In the 1972 and 1982 legislation, "coverage" was co-extensive with suffering "personal injury by accident." Consequently, by definition there could be no coverage where there was no personal injury by accident, and there could be no personal injury by accident without coverage. The whole matter was subject to adjustment by the judicial decisions that allowed the coverage to be extended to all cases which the general public might reasonably assume to be covered and cases that might have found a proceeding for damages for personal injury at common law.

All of this may have been quite satisfactory but for the feeling of some of the scheme's administrators that these decisions were driving costs out of control. Regrettably, the administrators' claims were difficult to verify because the financial data kept by the Corporation was such that careful analysis of present trends in claims was impossible. Adequate data was not gathered. Such information within available categories suggested how modest the scheme's expenditures were. For example, in 1990 and 1991, compensation for medical misadventure totaled only five million dollars, or five tenths of one percent of the scheme's total expenditure. Proper policy development requires data which allows assessment and comparison to be made between categories of injured people and the types of their injuries and treatments and facilitates the allocation of costs to categories. Such information is still not available.

The 1992 Act takes a slightly different approach than its predecessors. Although the link between the concept of coverage and the concept of personal injury remains, it is now apparent that more occasions are contemplated in which there would be personal injury which is not covered by the Act. This would open the door to common law actions.

The new Act reduces coverage in two major ways.³¹ First, the Act now contains an exclusive definition of "personal injury." The definition is designed to remove any discretionary application by decision-makers. For example, the Act provides that only those mental injuries that are consequent upon physical injury are compensable. That overrules a decision of the Court of Appeal holding that there was coverage under the Act even where there was only mental injury.³² Furthermore, personal injury which meets the tests of the new legislation will only be covered by the Act if the injury is caused in certain specified ways. The statute now requires that the injury be caused by "an" accident rather than simply "by accident." Thus coverage no longer exists where only the result was accidental, where the injury could not be attributed to any identifiable external event, and where a person has suffered harm from

31. See Stephen Todd & John Black, Comment, *Accident Compensation and the Barring of Actions for Damages*, 1 TORT L. REV. 197, 209-17, 220-23 (1993).

32. *Accident Compensation Corp. v. E.*, [1992] 2 N.Z.L.R. 426 (C.A. 1991).

observing physical injury to another person. Thus, the policy view that the courts had expanded coverage too far is faithfully reflected in the new Act. The Act cuts back the coverage.³³

33. Section 3 of the Accident Rehabilitation and Compensation Insurance Act 1992 contains the following definition:

"Accident" means—(a) A specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process; and the fact that a personal injury has occurred shall not of itself be construed as an indication or presumption that it was caused by any such event or series of events; or (b) The inhalation or oral ingestion of any solid, liquid, gas, or foreign object where the inhalation or ingestion occurs on a specific occasion; but does not include inhalation or ingestion of a virus, bacterium, protozoa, or fungi, unless that inhalation or ingestion is the result of a criminal act of another person; or (c) Any exposure to the elements or extremes of temperature or environment within a defined period of time not exceeding 1 month that causes disability that lasts for a continuous period exceeding 1 month or death; or (d) Any burn or exposure to radiation or rays of any kind on a specific occasion that is not a burn or exposure caused by exposure to the elements; or (e) The absorption of any chemical through the skin within a defined period of time not exceeding 1 month—but excludes any of the occurrences specified above that is treatment by or at the direction of a registered health professional or treatment provided outside New Zealand by or at the direction of a person who has qualifications equivalent to those of a registered health professional in New Zealand.

Accident Rehabilitation and Compensation Insurance Act 1992, § 3.

Personal injury is also defined in section 4:

(1) For the purposes of this Act, "personal injury" means the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person, and has the extended meaning assigned to it by section 8(3) of this Act. (2) For the purposes of this Act, no cardio-vascular or cerebro-vascular episode shall be regarded as personal injury unless—(a) It is a result of medical misadventure; or (b) It is a work injury by virtue of section 6(1) of this Act.

Accident Rehabilitation and Compensation Insurance Act 1992, § 4.

Section 8 provides coverage under the scheme for personal injury occurring in New Zealand in the following terms:

(1) This Act shall apply in respect of personal injury occurring in New Zealand on or after the 1st day of July 1992 in respect of which there is cover under this Act. (2) Cover under this Act shall extend to personal injury which—(a) Is caused by an accident to the person concerned; or (b) Is caused by gradual process, disease, or infection arising out of and in the course of employment as defined in section 7 or section 11 of this Act; or (c) Is medical misadventure as defined in section 5 of this Act; or (d) Is a consequence of treatment for personal injury. (3) Cover under this Act shall also extend to personal injury which is mental or nervous shock suffered by a person as an outcome of any act of any other person performed on, with, or in relation to the first person (but not on, with, or in relation to any other person) which is within the description of any offense listed in the First Schedule to this Act. (4) For the purposes of subsection (3) of this section, it is irrelevant that—(a) No person can be or has been charged with or convicted of the offense; or (b) The alleged offender is incapable of forming criminal intent.

Accident Rehabilitation and Compensation Insurance Act 1992, § 8.

A case where the injury suffered resulted from an apnoeic attack of an indeterminate cause raised the possibility of the scheme creeping gradually towards including incapacity resulting from sickness.³⁴ The 1992 policy-makers overlooked, however, the value of the previous approach. The 1972 and 1982 Acts provided the courts and the appeal authority with the flexibility to consider the range of old common-law actions in deciding whether to afford coverage under the scheme. In that way, there was a much smaller chance of excluding worthwhile cases from the scheme, thereby giving rise to the possibility of an action for damages. The chances of such actions arising in the future have been significantly increased. It is inevitable that there will be cases of personal injury that are not now covered.

On the basis of the above analysis, a range of circumstances in which common-law actions may in the future be available in New Zealand has developed. The range of such circumstances is not as great as some have suggested.³⁵ Instances which would have been covered under the earlier legislation, but which may not now have coverage under the 1992 Act, include:

- physical harm resulting from negligent (or criminal) infliction of disease;
- what was traditionally known as nervous shock, except where it results from the commission of one of the criminal offenses specified in the Act;
- mental injury where no physical injury has been suffered by the claimant;
- where the injury itself constituted the accident and there was no application of force external to the body;
- heart attack or stroke caused by shock, or consequential on other personal injury, or caused by mental stress or strain in the workplace;
- shock occasioned by certain criminal offenses;
- disease and infection not caused by employment, medical misadventure, or personal injury;
- drug trials which are not approved as provided in the Act; and
- negligent treatment by non-registered health professionals.

In 1992, the legislation mandated a substantial reduction in benefits, including abolition of lump sums for non-pecuniary loss, greatly narrowing the scope of entitlements for certain groups, particularly women who were not employed. The scheme's reduced coverage brings a greater possibility of common-law actions. It is clear that the incentives are now pointing in the

34. *Accident Compensation Corp. v. Mitchell*, [1992] 2 N.Z.L.R. 436 (C.A. 1991).

35. RODNEY HARRISON, *MATTERS OF LIFE AND DEATH* (Legal Research Found. Pub. No. 35, 1993).

wrong way. There is likely to be greater recourse to civil proceedings than in the past. It was precisely this situation that the framers of the original legislation were determined to prevent.

Where common-law actions are available in New Zealand, trial by jury will still be available. How juries will handle awards twenty years after that procedure was terminated is difficult to predict. However, it is quite conceivable that the lump-sum jury awards will be large and attractive to plaintiffs. Through the publicity which would inevitably attend revival of a discarded social institution, a political market could easily be created for allowing people generally to have the opportunity to sue. The pressure to allow people to have the opportunity to sue has increased because of the removal of compensation by way of a lump-sum award for intangible loss in the 1992 legislation.

Holding the line in this situation would not, from a political point of view, be a simple matter. After 1992, there are two classes of accident victims in New Zealand: those who can claim tort damages and those who cannot. While membership in the second category is small in number, that only makes it worse. Why should some be able to seek the pot of gold at the end of the common-law rainbow and others be deprived of that opportunity? The scheme design, until 1992, carefully prevented such an inequality from arising. The Court of Appeal decisions, regarded as expansionary by the scheme's administrators, may well have saved the scheme from greater perils. As it is now, a swell of support for the return of the common law has begun. Submissions to a recent inquiry established by the Minister for Accident Rehabilitation and Compensation Insurance stated:

The Woodhouse principles of community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency are relevant as the "social contract" (whereby the right to sue was given up in return for full coverage by ACC) was based on these principles. The "social contract" has been breached after the removal of lump-sum compensation, the increase in the level of charges payable by the claimant and with the introduction of the earners' premium. The right to sue should be reinstated as the "social contract" has been breached.³⁶

The demands for reinstating the right to sue have not reached an irresistible level, but my judgment is that they will have real political potency unless steps

36. ACCIDENT COMPENSATION CORP., REGULATIONS REVIEW PANEL REPORT 54 (Aug. 11, 1994).

are taken to improve the benefits offered by the scheme. The scheme is regarded by the populace as having been unnecessarily degraded.

The signs were well summed up by the Minister's own Regulation Review Panel, already quoted, who, after listening to public submissions, told the Minister in a published report:

In the course of our intensive review of the Regulations over the last nine months, we have been disturbed at the extent and depth of dissatisfaction with ACC which we have found around the country. Even after making due allowance for the likelihood that those who were generally satisfied with the scheme would not write to us or attend our meetings, there appears to be widespread loss of support for ACC as currently structured and administered. We think, however, that there remains general support for the concept of ACC.³⁷

The policy coalition which threatens to develop is a combination of those on the left and the right. On the left, the trade unions feel that the reduction of benefits has made the withdrawal of the right to sue unfair. They want more for their members. On the right, economic rationalists argue that there is no place for a state-run scheme of this nature, and it ought to be made subject to privatization or competition. In addition, there are some Treasury advisers who, in the past, have been prepared to argue that the common law is economically efficient. The scope here is obvious for groups of various hues to agree, for quite different reasons, upon a policy line which calls for restoration of the right to sue. It might be termed an incompletely theorized agreement on a particular policy.³⁸

The point of general application to be derived from this experience relates to the range of the common law. The comparison between the coverage of the common law and the range of its damages is the controlling comparison in both policy analysis and in tests of political acceptability. It can be reduced to a syllogism:

1. *The right to sue has been removed;*
2. *The right to sue was removed only because of comprehensive coverage and generous benefits, which were comparable to those provided by the common law but were made available to all without proof of fault; therefore*
3. *Reduction of the coverage and the benefits justifies a return*

37. *Id.* at 57.

38. Cass Sunstein, unpublished paper delivered at the University of Iowa College of Law, Sept. 16, 1994 (on file with the author).

to the common law for those who could benefit from it.

The strongest argument against this syllogism is the wider coverage offered by the new scheme. There is a trade-off between guaranteed benefits not dependent on proof of fault and a reduction in benefits. Such a trade-off is familiar to Americans, since it was the basis of both workers' compensation and the no-fault automobile plans which were adopted in twenty-four states between 1970 and 1975. Notwithstanding the force of the argument, it can be countered by saying that had the initial scheme been as stingy as the one now in place, it would not and should not have been enacted. That point is historically valid. Without the sweetening given by the inclusion of wide coverage and the lump sums for intangible loss, initial enactment of the New Zealand scheme would have been difficult.³⁹

Thus, my conclusion is that, even more than twenty years later, the memory of the common law exercises a powerful influence over the arguments relating to the shape of the New Zealand scheme. The point is counter-intuitive. It was not expected by the system's designers that the common law would continue to exert a strong limitation on the range of system design.

III. NERVOUS SHOCK AT COMMON LAW

An excursion into the issues raised by nervous shock will underscore the dilemmas created by the common law for compensation-system design. The term "nervous shock" has historically been used to describe the mental injury suffered by a victim of the tortious act of another. Given the developments in modern psychiatric medicine, nervous shock has been stigmatized by recent commentators as "entirely inappropriate to describe the harm for which relief might be had."⁴⁰ Although the term is vague and inappropriate, it stubbornly inhabits judgments in tort cases around the common-law world. "Nervous shock is injury caused by the impact on the mind, through the senses, of external events."⁴¹ This injury can be divided into three categories: physical injury, such as a pregnant woman who suffers miscarriage as a result of the shock; psychological injury, such as depression or other psychiatric illness; and psychosomatic consequences, such as, paralysis.

In the course of this century, there appears to have been a greater acceptance of the adverse consequences that psychic trauma can have on people's lives. Drawing the line between the deserving and nondeserving case,

39. GEOFFREY PALMER, COMPENSATION FOR INCAPACITY 89-91, 101 (1979).

40. NICHOLAS J. MULLANY & PETER R. HANDFORD, TORT LIABILITY FOR PSYCHIATRIC DAMAGE 14 (1993).

41. CANE, *supra* note 2, at 72.

it might be suggested, may be even more difficult in an environment where the need to prove fault has been eliminated. An important part of the nervous-shock problem has been the traditional suspicion of damage when the consequence is hard to measure, in contrast to orthopaedic injury, for example, which is of a more tangible or obvious character. Furthermore, the relative lack of development of medical knowledge concerning the mind fuels the tendency to be cautious. There is a well documented fear of false and fraudulent claims in negligence cases.⁴²

Yet, from its earliest days, tort law allowed damages for assault, which is the apprehension that physical harm will be inflicted imminently by a defendant who has the ability to carry out his or her threats even though no physical contact was actually made. Even though assault is an intentional tort, the early common law exhibited a solicitude for the plaintiff's peace of mind and showed concern with psychic factors by not requiring proof of physical contact or harm.⁴³ Indeed, in the course of time, a separate tort of intentional infliction of emotional harm developed, predicated upon the principle that "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability."⁴⁴

Liability for infliction of emotional harm through the tort of negligence is wrought with many obstacles. I shall try to summarize the present state of American tort law on the subject of nervous shock.⁴⁵ Bearing in mind the difficulty of actually stating what the law generally is in American jurisdictions, as opposed to any particular jurisdiction, I shall state, in broad terms, the law relating to the intentional infliction of emotional distress. Where the negligent conduct can be related to any impact on the person of the plaintiff, however slight, it is generally accepted that the courts will allow that impact to support liability for any emotional distress which results. In cases where there is no impact, recovery is subjected to further qualifications. In jurisdictions which allow recovery at all beyond impact, most require that the emotional distress

42. *Victorian Rys. Comm'rs v. Coultas*, [1888] 13 App. Cas. 222, 226 (P.C. 1887) (fearing "a wide field opened for imaginary claims").

43. *I. de S. and Wife v. W. de S.*, 1348 Y.B. Liber Assisarum; *Tuberville v. Savage*, 86 Eng. Rep. 684 (K.B. 1669); 3 WILLIAM BLACKSTONE, COMMENTARIES *120; RESTATEMENT (SECOND) OF TORTS § 21 (1965).

44. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

45. I wish to observe, provocatively, that it has never been clear to me why the United States has not developed one common law in the manner that Australia has, in which the common law of the several states is kept under the watchful eye of the High Court of Australia in respect to its doctrinal development. Of course, states pass statutes which can modify the common law, but since that is relatively less important than the common law itself in the law of torts, it is fair to say that the common law of torts of Australia is relatively uniform compared with the United States, where it is highly varied. One court, deciding common-law appeals for Australia, brings coherence and uniformity which is absent in the American tort law.

result in physical illness or comparable objective bodily consequences. Additionally, where the negligent conduct threatens bodily harm but does not actually result in it, most American jurisdictions will allow the plaintiff to recover for bodily harm resulting from the shock or other emotional distress caused by the presence of the plaintiff. This is termed the "zone of danger" rule.

Some of the jurisdictions take a more generous approach to recovery for nervous shock than the limits imposed by the "zone of danger" rule. That approach was pioneered by the Supreme Court of California in one of its phases of tort expansion in the 1960s. In the celebrated case of *Dillon v. Legg*⁴⁶ in 1968, the California Supreme Court established a test which allowed recovery for nervous shock where the shock resulted in physical injury on analysis of a number of factors: (1) whether the plaintiff was near the scene of the accident, as contrasted with someone who was a distance away from it; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from the contemporaneous observance of the accident, as contrasted with learning of the accident from others after it occurred; and (3) whether the plaintiff and the victim were closely related, as contrasted with the absence of any relationship or the presence of only a distant relationship. These factors were advanced as determining whether the accident was reasonably foreseeable. Application of this test to the facts of the case led to recovery. A mother saw her child, who was crossing a public street, struck by a car and killed. The mother herself was in no physical peril.

American jurisdictions are heavily split over *Dillon*. In California itself, the decision was questioned, though not overruled, in a 1989 case which denied recovery to a mother who had not witnessed an automobile accident which injured her child.⁴⁷ The court's opinion attempted to limit the recovery for emotional distress by bystanders to circumstances in which the plaintiff was closely related to the injury victim, was present at the scene of the injury-producing event at the time it occurred, was aware of it, and, as a result, suffered emotional distress "beyond that which would be anticipated in a disinterested witness."⁴⁸

Many American jurisdictions retain the zone-of-danger test which preceded *Dillon*. However, there also exists a theory developed later in California. Liability was imposed on a hospital which diagnosed the plaintiff's wife as

46. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

47. *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989).

48. *Id.* at 815.

suffering from an infectious type of syphilis.⁴⁹ The husband sued to recover for emotional distress arising from his fear that he may also have contracted the disease. Distinguishing *Dillon*, the court held that risk of harm to the plaintiff was readily foreseeable as a result of a false diagnosis. The court concluded that the husband could recover for his anguish caused by the breakdown of his marriage, which resulted from the mistaken diagnosis. The absence of physical injury on the part of the plaintiff was held no longer to be a necessary legal requirement of a successful claim. The court was divided four to three, but it held that the physical-injury requirement was both over-inclusive and under-inclusive when viewed against its purpose of screening out false claims. It was over-inclusive in that it permitted recovery on proof of any physical injury, no matter how trivial, but it was under-inclusive in mechanically denying a remedy for serious mental distress short of physical injury. Professor John Fleming has described this decision as both abandoning the last judicial control over juries in this class of case and recognizing a cause of action for negligent infliction of pain and suffering without physical injury.⁵⁰

The law of nervous shock in British Commonwealth jurisdictions has been in some respects more generous than the American approach, and for a longer period of time. As long ago as 1970, the English Court of Appeal ruled that while nothing was obtainable for grief and sorrow, damages were recoverable "for any recognizable psychiatric illness caused by the breach of duty by the defendant."⁵¹ In the celebrated English case involving multiple claims by relatives of people who were crushed to death as a result of overcrowding at a football stadium,⁵² Lord Ackner in the House of Lords observed:

A recital of the cases over the last century show that the extent of the liability for shock-induced psychiatric illness has been greatly expanded. This has largely been due to a better understanding of mental illness and its relation to shock.⁵³

While the House of Lords upheld a decision of the Court of Appeal denying claims for nervous shock in that case, the disaster caused ninety-five people to die and several hundred to be injured. Live pictures of the crushing were broadcast on television. The plaintiffs were either related to, or friends of,

49. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980). This decision can usefully be compared with the New Zealand decision of *Furniss v. Fitchett*, [1958] N.Z.L.R. 396.

50. JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 231 (1988).

51. *Hinz v. Berry*, [1970] 2 Q.B. 40, 42 (Eng. C.A.) (Lord Denning, M.R.). The case involved a wife who witnessed the death of her husband and the serious injuries to her children in a motor accident.

52. *Alcock v. Chief Constable of S. Yorkshire Police*, [1992] 1 App. Cas. 310, 399 (1991).

53. *Id.*

spectators who were crushed on the terraces at the soccer ground. Some plaintiffs witnessed the events from other parts of the stadium. One plaintiff saw it from just outside the stadium on television and went in search of his missing son. Others were at home and either watched the events on television or heard about them from friends or radio reports, and some only saw recorded television pictures later. All of the plaintiffs alleged that the impact of what they had seen caused them severe shock resulting in psychiatric illness. In most instances, the diagnosis was post-traumatic stress disorder, an anxiety disorder. The evidence was interesting.⁵⁴

54. *Id.* at 317. The trial judge quoted the relevant evidence as follows:

Dr. O'Connell's generic report stated that: "The most common diagnosis made was post-traumatic stress disorder . . . a new concept (1980) for an old problem," and he indicated earlier names such as neurasthenia, shell shock and nostalgia.

It is classified as an anxiety disorder. It follows on a painful event which is outside the range of normal human experience, the disorder includes preoccupation with the event—that is intrusive memories—with avoidance of reminders of the experience. At the same time there are persistent symptoms of increased arousal—these symptoms not being present before the event. The symptoms may be experienced in the form of sleep difficulty, irritability or outburst of anger, problems with memory or concentration, startle responses, hypervigilance and over-reaction to any reminder of the event. The characteristics of post-traumatic stress disorder identified amongst the casualties seen included apprehension, with the person being on edge, tense and jumpy. There appears to be a need to talk a great deal about the incident and where physical pain or injury was experienced in association with the disaster, it appears to have become disproportionate to the actual injury incurred. Almost all the casualties suffering post-traumatic stress disorder complained of sleep disturbance, with associated tiredness and fatigue. Flashbacks and nightmares of the event with similar emotional reactions as if the disaster was actually happening again, were commonly recorded. Many described an inability or difficulty in carrying out normal life activities such as work, family responsibilities or any activity normally engaged in before the disaster. Phobia or an irrational fear leading to avoidance behavior was commonly reported and in particular, any queuing activity was avoided if at all possible—especially with those who were involved in the crush. All those in whom post-traumatic stress disorder was identified appear to have undergone a personality change, the significant features of which were that of being moody, irritable, forgetful and withdrawn within themselves, frequent unprovoked outbursts of anger and quarrelsome behavior was reported. The majority of cases were either depressed or had experienced significant depression at some time and I wrote to a number of general practitioners drawing attention to a need for more active treatment of this depression.

Dr. O'Connell also identified a further psychiatric illness known as pathological grief which he defined as: "grief of greater intensity and duration than normal grief, it is more likely to occur where death is sudden, unexpected and brutal in nature." He noted that of the people he had seen, all but one had more than one illness. Thus he identified in respect of each of the plaintiffs a specific psychiatric illness suffered by

In an earlier House of Lords decision,⁵⁵ Lord Wilberforce had presciently suggested, in dicta, that simultaneous television might be sufficient proximity for recovery.⁵⁶ In the stadium case, the House of Lords decided that the test to be applied in such cases should not be too rigid. It was necessary to show that the injury was reasonably foreseeable and that the relationship between the plaintiff and defendant was sufficiently proximate. The duty could not, however, be limited to particular relationships, such as husband and wife or parent and child, but was based on ties of love and affection, the closeness of which required proof in each case. The more remote the relationship, the more scrutiny was required.

Plaintiffs also had to show propinquity in time and space to either the accident or its immediate aftermath. For the plaintiffs involved in the appeal who had been at the match, the mere existence of the relationship was insufficient to give rise to a duty. It was further held that viewing the disaster on television was not equivalent to being within sight and hearing of the event or its immediate aftermath. Thus, the claims failed.

The result was not altogether predictable given the extension of the nervous shock line of cases that the House of Lords itself had engaged in a decade earlier. Indeed, the two leading commentators in the first legal text devoted exclusively to liability for psychiatric damage have excoriated the decision as "hav[ing] closed the door on further developments, at least in England, for some years to come."⁵⁷

In *McLoughlin v. O'Brian*,⁵⁸ an appeal allowed recovery for nervous shock where the plaintiff's husband and three children were involved in a road accident two miles away. The plaintiff was told of the accident by a neighbor who took her to the hospital to see the family two hours after the accident. At the hospital, she learned that her youngest daughter had been killed, and she saw the nature and extent of the grievous injuries suffered by family. She alleged that she had suffered depression and a change in personality. It was held that the plaintiff's nervous shock was a reasonably foreseeable result of her family's injuries and was caused by the defendants' negligence.

While the lower court had fixed the boundary of recovery by deciding that there was no liability on these facts, the House of Lords reversed and held that

them.

Id.

55. *McLoughlin v. O'Brian*, [1983] 1 App. Cas. 410 (1982).

56. *Id.* at 423.

57. MULLANY & HANDFORD, *supra* note 40, at ix.

58. [1983] 1 App. Cas. 410 (1982).

no policy arguments were sufficiently compelling to preclude recovery. The possibilities of a proliferation of either claims or fraudulent claims, the additional burdens on insurers, the addition of further complications to litigation, or that the matter was one better dealt with by the legislature were all arguments which failed to impress as reasons for denying recovery.⁵⁹ The House of Lords reasoned that other plaintiffs who came upon the aftermaths of accidents had succeeded before, and this could fairly be regarded as within that category.

One English case goes further and places the test for liability upon neither apprehension of personal physical peril, nor upon seeing relatives or loved ones mangled. Rather, the case extended liability to psychiatric illness caused by nervous shock from witnessing the destruction of one's property.⁶⁰ When a woman returning home saw smoke coming out of her house, she telephoned the fire brigade. The house and contents were extensively damaged by the fire which was caused by the defendants' negligence in installing central heating in the plaintiff's home. The plaintiff suffered no physical injury but did allege psychiatric illness. In determining a preliminary point of law, the English Court of Appeal decided that, as a matter of law and public policy, liability could not be excluded. It could not be held as a matter of law that, under the circumstances, there was no foreseeability. Both causation and foreseeability were issues of fact to be tested at trial.

It is clear that nervous shock is a controversial area of the common law in which the range of liability has been expanded only gradually and cautiously.⁶¹ A range of factors remains available to the judiciary through which cases may be filtered. The manner in which the rules for limiting liability have shifted over time illustrates the difficulty that has been experienced in finding a place upon which to stand that is defensible in principle and relatively acceptable in

59. *Id.* at 421 (Lord Wilberforce).

60. *Attia v. British Gas Plc.*, [1988] 1 Q.B. 304 (Eng. C.A. 1987). This case is comparable in some ways to *Owens v. Liverpool Corp.*, [1939] 1 K.B. 394 (Eng. C.A. 1938), where a hearse in a funeral procession was negligently damaged by a tram and the coffin turned over. The mourners who saw this recovered damages for distress caused by their fear that the coffin might fall out of the hearse.

61. In Australia, four of the jurisdictions have dealt with the matter by legislation. Damages for psychic injury in motor-accident cases have been expressly restricted to persons present at the scene of the accident or to close relatives of the victim in both New South Wales and Victoria. FLEMING, *supra* note 16, at 164. New South Wales passed a statute in 1944 in the following terms:

The liability of any person in respect of injury caused . . . by an act, neglect or default by which any other person is killed, injured or put in peril, shall extend to include liability for injury arising wholly or in part from mental or nervous shock sustained by (a) a parent or the husband or wife of the person so killed, injured, or put in peril; or (b) any other member of the family of the person so killed, injured or put in peril within the sight or hearing of such member of the family.

Law Reform (Miscellaneous Provisions) Act of 1944, § 4(1).

practice. Indeed the common law, both in the United States and in the British Commonwealth, has found no such place. Looking back, there has been a gradual but inexorable expansion of liability for nervous shock during the course of the twentieth century. The law can be regarded as neither settled nor at rest. It is in a state of dynamic evolution, struggling to keep up with developing social attitudes. It is under pressure. There are real values reflected in these cases, and they are of a type which will increase in importance and scope in post-modern societies.

A number of factors can be extracted from the common-law cases which influence the outcome of particular cases. The plaintiff must be foreseeable by the defendant and the kind of damage must be foreseeable. These are both rather flexible standards. Proof of causation raises formidable problems in this class of cases, and much will depend upon expert psychiatric evidence. The range of causation problems is greater with emotional injuries than with physical injuries.

The law's prime concern has always been with the primary victim of the negligence, not with secondary victims who incur expenses or lose support as a result of the accident.⁶² Cases involving secondary victims who suffered nervous shock carved out an exception to this general approach, although another interpretation of negligence principles is that such victims are owed a duty in their own right. In other words, when A negligently injures B in the presence of C, he or she owes a duty not only to B not to injure him or her, but also a duty to C not to shock him or her by injuring B.

The relationship of the plaintiff to the primary accident victim is an important variable. Mere bystanders do not fare as well as close relatives under the tort rules. However, liability is not restricted to familial relations, as cases have allowed rescuers⁶³ and fellow workers⁶⁴ to recover. There has been reluctance to extend liability beyond that point, although there is little reason in logic for the distinction. The distinction's validity has been doubted by the House of Lords.⁶⁵

The issue of proximity of the plaintiff to the accident is a factor which dominated the early cases and was gradually relaxed. Actual presence at the scene gave way to the "zone of danger" rule, which developed into the multi-

62. FLEMING, *supra* note 16, at 179.

63. Chadwick v. British Transp. Comm'n, [1967] W.L.R. 912.

64. Mountisa Mines Ltd. v. Pusey, 125 C.L.R. 383 (1970).

65. Alcock v. Chief Constable of S. Yorkshire Police, [1992] 1 App. Cas. 310 (1991); see Lord Keith, *id.* at 397; Lord Ackner, *id.* at 403; Lord Oliver, *id.* at 416; Lord Jauncey, *id.* at 421-22.

factor test of California and the "aftermath" doctrine in England.⁶⁶ Proximity relates not only to the place of the accident, but also to the lapse of time between the accident and the plaintiff's arrival at the scene or its aftermath. The manner in which the gruesome facts are communicated is also an important variable. Personal witnessing of the events is the most likely situation to produce a favorable outcome for the plaintiff. Being told of the disaster by others is frequently not enough to obtain recovery under English law.⁶⁷ On the other hand, where two factors—personal perception and third-party communication—are combined, the chances of recovery improve.

The current treatment of cases in which the bad news of an accident is communicated to the plaintiff by a third party has been criticized,⁶⁸ and it could change in the next few years. Clearly, live broadcasts by radio and television—especially the latter—where the news selection policies greatly favor lurid and heart-rending reports of human disaster, bring new challenges to the common law of nervous shock. These problems were discussed in the English soccer stadium case. Indeed, as was pointed out there, television sometimes gives a superior view of a catastrophe as compared to actual presence at the scene. While recovery was not permitted in that case for television-induced nervous shock, there were several suggestions in the case that "the element of direct visual perception may be provided by witnessing the actual injury to the primary victim on simultaneous television."⁶⁹ While television in some jurisdictions does follow ethical rules regarding the broadcast of the suffering of recognizable individuals—and this was so in the English soccer stadium case—highly competitive television markets do not promote squeamish reporting of human catastrophe.

Recordings, since they are delayed in time, raise issues concerning proximity. Psychiatric damage could be caused by communicating the news by telephone, but courts have been reluctant to allow such claims. A Hawaiian court allowed recovery for a telephone call announcing the death of the plaintiff's dog, which the defendants had negligently transported in an

66. *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968); *Boardman v. Sanderson*, [1964] 1 W.L.R. 1317 (Eng. C.A. 1961); *McLoughlin v. O'Brian*, [1983] 1 App. Cas. 410 (1982); *Jaensch v. Coffey*, 155 C.L.R. 549 (1984).

67. *King v. Phillips*, [1953] 1 Q.B. 429 (Eng. C.A.); *Hambrook v. Stokes*, [1925] 1 K.B. 141 (Eng. C.A. 1924); *Alcock v. Chief Constable of S. Yorkshire Police*, [1992] 1 App. Cas. 310 (1991).

68. MULLANY & HANDFORD, *supra* note 40, at 170.

69. *Alcock*, [1991] 1 App. Cas. at 417 (Lord Oliver).

unventilated van on a hot day.⁷⁰ Facsimile messages and electronic mail have yet to lead to nervous-shock cases.

Another device used to filter out cases is the requirement that the shock be sudden and unexpected and that the shock make an impact on the sensory perception. A gradual slide into depression or other psychiatric illness due to the victim's long-term condition will not be sufficient. This requirement of unexpectedness has been criticized as superfluous, and it is another area in which the law may change in the future.

The source of the shock is yet another variable which permits judicial control to be exerted on the scope of recovery in nervous-shock cases. The paradigmatic case is witnessing the suffering of a loved one. However, as has been pointed out, a cause of action can be based on the negligent destruction of property.

Peculiarly sensitive plaintiffs are not dealt with sympathetically by this branch of the law. The standard is the ordinary person of normal fortitude. As the English cases put it, plaintiffs are assumed to exhibit the "customary phlegm."⁷¹

Lively controversy exists concerning the current state of the common-law rules regulating recovery for nervous shock. An excellent book, the first devoted to the subject, was published in 1993 and deals with all common-law jurisdictions. The authors, Nicholas J. Mullany and Dr. Peter R. Handford, have exhaustively examined the law and are convinced that the ambit of liability should be extended.⁷² They conclude that:

the common law remains very far from the position it ought to be in. Indeed, in terms of doctrinal maturation, psychiatric damage law is still, after a century, to some degree in its embryonic stages. The relatively recent sophistication of this branch of medical science provides part of the explanation for the immaturity of the law, but the more telling reason is society's failure to appreciate, or refusal to admit, that serious disruption to peace of mind is no less worthy of community and legal support than physical injury to the body, even given that priorities in accident compensation require careful thought

70. *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981). Compare this decision with *Haselhorst v. State*, 485 N.W.2d 180 (Neb. 1992), in which parents (representing children) recovered damages for nervous shock against the State for sexual abuse which occurred as the result of negligent placement of the children in foster homes.

71. *Hay or Bourhill v. Young*, [1943] App. Cas. 92, 117 (Lord Porter).

72. MULLANY & HANDFORD, *supra* note 40, at ix.

in the face of limited resources.⁷³

The authors deplore the secondary status accorded by the law to psychiatric harm as compared to physical harm. They would sweep away the restrictions discussed above. Mullany and Handford argue that liability should be imposed unless there is a sound legal, policy, medical, scientific, or commonsense ground for refusing it. They do not find the threat of a multiplicity of actions at all convincing, and they point out that to suffer recognizable psychiatric damage from an event is itself exceptional, and proof of it is not easy. Secondary psychiatric responses to stimuli are a relatively rare phenomenon. Additionally, grief rarely develops into post-traumatic stress disorder. Mullany and Handford make a powerful case.

To this analysis may be added the arguments of feminist scholars, examining many of the same cases, who find that the law of torts "has placed women's fright-based injuries at the margins of the law by describing women's suffering for the injury and death of their unborn and born children as remote, unforeseeable, and unreasonable."⁷⁴ These scholars also point out that such cases can be regarded as women's-rights claims and involve efforts to pressure the legal system to value the interests of women. Feminist scholars suggest that gendered thinking has greatly influenced the law of negligent infliction of emotional distress.⁷⁵

The case for liberality in distress cases has been strenuously challenged by American torts professor David Robertson, who reviewed Mullany and Handford's book in the *Modern Law Review*.⁷⁶ He finds that the suggested changes are likely to produce an avalanche of litigation. According to Robertson, there would be no way of disposing of cases before trial, there would be more cases, and it would hardly be worth the effort given the low level of damages in such cases. He thinks the progression of the common law now shows that the law is slipping down "an exceedingly slippery slope."⁷⁷ He objects strongly to further lowering the barriers to recovery.

The answer to the controversy depends very much on the perspective from which it is examined—that of the plaintiff or the defendant. All of tort law can

73. *Id.* at 308.

74. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 816 (1990).

75. Leslie Bender, *An Overview of Feminist Tort Scholarship*, 78 CORNELL L. REV. 575, 577-79 (1993).

76. David W. Robertson, *Review Article—Liability in Negligence for Nervous Shock*, 57 MOD. L. REV. 649 (1994).

77. *Id.* at 655.

be analyzed along these perspectives. The next topic to which we will turn our attention is how the nervous-shock variables play out in a legal setting in which the barriers to recovery erected by negligence law have no role.

IV. NERVOUS SHOCK AND ACCIDENT COMPENSATION

The area of nervous shock poses significant design problems for compensation schemes, just as it did for the tort system itself. In New Zealand, the accident compensation scheme between 1973 and 1992 dealt with the nervous-shock issues cautiously but in a manner which did not leave much room for residual common-law actions. The Court of Appeal, in particular, was careful to deal with liability problems in a way which was attentive to the basic policy. Discussing the threshold phrase "personal injury by accident," the President, Sir Robin Cooke, remarked in one judgment:

As is well known, the Act is designed fundamentally to supplant the vagaries of actions for damages for negligence at common law. It is not co-incident with the field of such actions, but interpretations taking the bar in the Act beyond that field have to be carefully scrutinised.⁷⁸

The relevant section provided expressly that the term "personal injury by accident" included "the physical and mental consequences of any such injury or of the accident."⁷⁹ It was decided that mental injury did not have to be a consequence of physical injury in order to be compensable under the scheme.⁸⁰ In the New Zealand Court of Appeal decision which established this point, the claimant, a forty-nine-year-old woman, attended a management course. It was a large organization, and she was a senior person who held a position of responsibility. It was a vigorous course which lasted from 8:30 a.m. to 11:00 p.m. each day, and she suffered a psychiatric breakdown requiring hospital admission. The management course was an instrumental factor in her mental breakdown. The court held that this was a mishap which caused harm to the plaintiff and was within the definition of "personal injury by accident," notwithstanding that there was no particular event that could be isolated. "To construe injury by accident so as to require the identification of a separate causative unexpected event from which the injury results would be to enter a Serbonian bog."⁸¹ No particular causative incident had to be alleged in order to bring the facts within the statutory definition. The mental consequence did not have to be parasitic on a contemporaneous or earlier physical injury. The court was not persuaded by either the problem of where to draw the line or the

78. *Willis v. Attorney Gen.*, [1989] 3 N.Z.L.R. 574, 576 (C.A.).

79. Accident Compensation Act 1982, § 2.

80. *Accident Compensation Corp. v. E*, [1992] 2 N.Z.L.R. 426 (C.A. 1991).

81. *Id.* at 430 (Gault, J.).

familiar “opening the floodgates” refrain.

It also became clear relatively recently in New Zealand that bystanders, or secondary victims, were also covered. The facts of a High Court decision in 1993⁸² are particularly poignant:

The circumstances of this case are that the appellant's son died in November 1987 as the result of the criminal acts of a number of people. They had administered to the son a savage and prolonged beating and torture. They then literally threw him out of a car at the door of the hospital in what is described as a moribund and, indeed, a dying condition. He was immediately transferred to the casualty department and in intensive care was give[n] such treatment as was possible. He had been conscious when first taken to intensive care but by the time his parents were informed and came to the hospital some five hours had elapsed and he was no longer conscious. He never regained consciousness but died about 20 hours later with his mother, who had remained in a vigil, by his bed. The circumstances of that vigil were clearly of the most distressing kind and would have been a fearful experience for anyone, let alone a mother.⁸³

On appeal from the Accident Compensation Appeal Authority, the court held that a mental injury could, of itself, constitute personal injury by accident. The court reasoned that the claimant did not need to be physically injured. The claimant suffered an injury, and the events at the hospital clearly constituted an accident. The matter was sent back to the Accident Compensation Appeal Authority because expert evidence was required to show that the tragic events caused the injury.

This approach was quite compatible with the approach adopted by the Court of Appeal in an earlier case that involved a clinical experiment in a research hospital which was conducted to prove that carcinoma of the cervix in situ was not a premalignant disease. The experiment involved research and experimentation without the plaintiff's consent, and the plaintiff not only contracted cancer, but also experienced pain, suffering, humiliation, annoyance, and distress. The phrase: “the physical and mental consequences of any such

82. *Cochrane v. Accident Compensation Corp.*, [1994] N.Z.A.R. 6.

83. *Id.* at 7. *Accident Compensation Corp. v. F*, [1991] 1 N.Z.L.R. 234 (H.C. 1990), was a case in which the claimant said he suffered from reactive depression as a result of medical misadventure to his wife. The judge dismissed the claim on the ground that there had to be some physical injury. This decision is incompatible with the Act under which it was made and inconsistent with other decisions, but anticipates the approach taken to nervous shock in the 1992 legislation.

injury or of the accident," was broad. As the court explained, "Those words are not limited to mental consequences identifiable by some particular psychiatric description, nor to what is often called shock or trauma."⁸⁴ This conclusion was reached by relying on the reasoning in an earlier decision, which refused to treat assault, as contrasted with battery, as outside the coverage of the scheme.⁸⁵ In that case, the Judge decided that "precise classification of feelings and of mental consequences [was] not feasible."⁸⁶ This robust common-sense approach seems well in line with the policy of not allowing common-law actions to creep in at the margins of the compensation scheme.

What has happened in the New Zealand scheme is that the boundaries of the nervous shock doctrine have moved incrementally in an expansionist direction, but neither at a speed nor in a manner which have imperiled the scheme, either in principle or financially. The "floodgates" argument is no more persuasive in a statutory compensation scheme than it was when first advanced in this class of cases by the Privy Council in 1888.⁸⁷

The 1992 legislation, however, deliberately reduces policy coverage for nervous shock, thereby opening up the possibilities for common-law actions in that area.⁸⁸ The result will be some jury trials in such cases. This could have a serious undermining effect upon both the scheme and the public attitude towards it.

This brief account of the pre-1992 New Zealand decisions under the accident compensation legislation is strikingly similar to the methods of common-law adjudication for nervous shock.⁸⁹ While it is true that statutory provisions are being construed, these provisions were generalized formulae which gave a range of choice to judges in determining the outcome in particular fact patterns. The old workers' compensation cases were instrumental in laying the groundwork. This was hardly surprising, given that "personal injury by accident" was the phrase which first appeared in that legislation and that this phrase was coupled with the employment connection: "arising out of and in the course of employment."⁹⁰

84. *Green v. Matheson*, [1989] 3 N.Z.L.R. 564, 572 (C.A.).

85. *Dandoroff v. Rogozinoff*, [1988] 2 N.Z.L.R. 588, 598 (H.C.).

86. *Id.*

87. *Victorian Ry. Comm'rs v. Coultas*, [1888] 13 App. Cas. 222 (P.C. 1887).

88. Rosemary Tobin, *Nervous Shock; The Common Law; Accident Compensation*, [1992] N.Z.L.J. 282, 287.

89. See *supra* Section III.

90. In New Zealand, as in the United Kingdom, when workers' compensation existed, it was never the exclusive remedy that it became in the United States. An injured person could pursue both remedies to judgment and then elect between them.

The development of the accident-compensation cases in New Zealand on nervous shock is comparable to the common-law decisions, as many of the same factors are at work. Indeed, in the bystander case,⁹¹ the judge explicitly relied on the common-law approach:

As with the common law claim for nervous shock a person may be covered and what occurs to that person may be personal injury within the meaning of personal injury by accident when she comes upon an accident or is involved in the result of an accident.⁹²

The judge regarded the summons to the hospital, the fearful sight presented, and the subsequent vigil as an untoward and unexpected event or mishap and, therefore, an accident. It is suggested that this approach would meet with the approval of those authors cited in the previous section who wished to see the common law of nervous shock put on a better basis. Not only does the bystander not have to show negligence, but the trauma itself is an accident. It is impossible to predict whether restrictions as to familial relations, proximity of time and space, means of communication, or suddenness and source of the shock would be read into tests by New Zealand judges since the provision which gave rise to these decisions has been repealed.

The significant policy point is that it took twenty years to get a secondary-victim case in New Zealand. The floodgates do not seem to have been opened very wide to nervous-shock cases by the Accident Compensation Act of 1972 and its successor. That experience lends credence to the claim that this class of cases does not constitute a fertile source of dubious claims. The extra costs of the approach that the courts were taking have never materialized, and I have little doubt that data does not exist which could substantiate the fear of such increased costs. However, I also doubt that the extra cost was, or would have become, significant in the context of the whole scheme.

The relatively open-textured test of the pre-1992 legislation allowed judges to walk the boundaries of the scheme, attentive to the need to screen out dubious claims where necessary, but also mindful of the range of the common-law action, in order to keep a weather eye open to avoid promotion of common-law actions. It is suggested that this was an entirely satisfactory approach and ought not to have been abandoned. It is not possible to draw bright-line tests in legislation when such factors are balanced as they are in these cases. They are peculiar factors to be weighed in a sort of common-law decision-making

91. *Cochrane v. Accident Compensation Corp.*, [1994] N.Z.A.R. 6.

92. *Id.* at 9. See also *Kennedy v. Accident Compensation Corp.*, [1992] N.Z.A.R. 107 (accepting claimant's argument that if medical evidence was available as to mental consequences, a claim would lie for being threatened by a double-barrelled shotgun during a robbery at work).

process, which develops gradually on a case-by-case basis. In important respects, the common law ruled the accident compensation scheme from its grave, not merely in the range of coverage afforded, but also in the method of making decisions in marginal situations. By abandoning that common-law approach, the legislature has unwittingly brought restoration of the common-law action closer.

What should be the appropriate policy approach in the New Zealand scheme? The proponents of the 1992 legislation were clearly motivated by the same concerns that are evident in the common-law decisions in this area. This perceived need to restrict potential claims no doubt stems both from the seemingly amorphous and all-encompassing nature of "mental injury" and from an historical suspicion of all psychiatric matters. The framers of the 1992 legislation were also driven by a more general desire to reduce costs and, therefore, reduce coverage.

The 1992 Act is too restrictive, and a strong argument can be made that the scheme should cover mental injury, at least to the extent that compensation is payable at common law. The question that then arises is whether the scheme should simply mirror the common law, and accordingly adopt its limits. The answer to that question can perhaps best be found by examining whether those limits are consistent with the scheme's underlying principles.

The question of the kind of damage that should be compensable is central to both the common law and the accident compensation scheme. It can usually be answered by reference to prevailing ideas about the purposes and aims of compensation. Public policy may determine that it is neither useful nor appropriate to compensate certain types of personal injury.

Accordingly, it is suggested that the common-law approach of restricting coverage to mental injury that constitutes a "recognizable mental illness" could easily be adopted by the accident compensation scheme. As at common law, this restriction could be justified on the basis that it reflects a belief in the usefulness and propriety of compensating mental harm of an identifiable and serious nature. The term "recognizable mental illness" could be further defined if necessary.

Concepts such as foreseeability and proximity, however, are more difficult. They are simply analytical tools that are used as a means of testing whether a particular defendant was negligent. Accordingly, they should have no place in a "no fault" compensation scheme where the proper focus is simply on whether or not a claimant has suffered a personal injury by accident. That said, however, in the absence of some kind of limitation on these lines, compensation would potentially be payable to a person who, for example, developed a

depressive illness as a result of viewing nightly scenes of death and destruction on the television news. Compensation would also be potentially available to a person who developed a depressive illness from the stresses and strains of ordinary life.

On one hand, while such cases might occur, it could be argued that they would be rare. It is unlikely that such a case would involve genuine psychiatric illness. Showing causation would also be difficult. It might be argued that it is not worth legislating for such an extremely small range of potential cases.

Alternatively, an attempt could be made to limit coverage to specified classes of people. However, a common-law action by someone not falling within the specified classes may one day successfully be brought. Moreover, this approach does not sit well with the overall aim of the legislation: to fairly compensate those who suffer a particular type of injury. It seems both unjust and anomalous to compensate the sister of an accident victim but not a cousin or a close friend, if each suffers the same illness as a result.

Limits on coverage could also perhaps be achieved by reference to the means by which the injury was caused. The old legislation did that to some extent by requiring that the injury be caused by "accident."⁹³ The judicial interpretation of that word became so wide, however, that it would not exclude the example referred to above.⁹⁴ Conversely, because the 1992 Act does not contemplate claims by secondary victims at all, the limited definition of "accident" in section 3 of the 1992 Act is of little assistance here.

In the end, it is difficult to see what kind of further limit could be placed on claims in this area without losing some of the scheme's overall coherence. Nevertheless, while there may be some concern about the potential breadth of coverage if the scheme does not adopt the common-law limits, the restrictive effect of limiting coverage to cases involving recognizable psychiatric illness cannot be underestimated. For example, Mullany and Handford⁹⁵ suggest that many of the "nervous shock" claims made prior to Lord Denning's enunciation of the "illness" restriction in 1970⁹⁶ would no longer be successful because of that restriction.

93. The best solution to limiting the range of the scheme is to define coverage by reference to the International Classification of Diseases. See GEOFFREY PALMER, COMPENSATION FOR INCAPACITY 262-70 (1979).

94. Accident Compensation Corp. v. E, [1992] 2 N.Z.L.R. 426 (C.A. 1991). See *supra* text accompanying notes 79-81.

95. MULLANY & HANDFORD, *supra* note 40.

96. Hinz v. Berry, [1970] 2 Q.B. 40.

It is suggested that, in order to prevent common-law actions in this area, coverage under the accident compensation scheme must extend both to primary and secondary accident victims and to cases involving mental injury without physical injury. However, compensation is payable at common law only in cases where a recognizable mental illness can be established. Thus, the scheme should be limited on the same basis.

One of the tragedies in the reform of accident law is its unfairness to the victims of illness and disease compared with those of accidental injury.⁹⁷ For some, that fact is advanced as a reason for not engaging in the reform.⁹⁸ However, I have never found that reasoning even remotely convincing. If the plight of a significant number of people can be improved, it is not a persuasive argument to say that the improvement should not be made because there is another group of people who also deserve help.

Nonetheless, in the area of nervous shock, which has been analyzed in terms of accident law, we face the problem of whether it makes any sense to separate some people with psychiatric illness caused by personal injury by accident from those whose psychiatric illness was not caused by personal injury by accident. The truth is that such discriminations cannot be justified in social terms, and a powerful argument exists for lifting compensation for incapacity caused by sickness to the same level as that of incapacity caused by accident. The practical difficulty is that the more that the common-law configuration raises the level of the accident-scheme benefits, the more difficult it is to extend it to sickness for cost reasons. When an effort was made to accomplish this in New Zealand in 1990,⁹⁹ the issue became whether a trade-off could be devised making it fair for accident victims to receive fewer benefits, given the wider protection that they enjoy from sickness coverage.

This is like the familiar trade-off between the common-law and workers' compensation. Analytically and from the point of view of social equity, once negligence is out of the equation extension of a compensation scheme to all forms of incapacity is inevitable in theory, although difficult to accomplish in practice. The modern approach to hazard in terms of social attitude would support the absence of a distinction between accident and disease. However, for the common law to influence the profile of a comprehensive sickness scheme

97. See generally GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES* (1978).

98. James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781, 782 (1981).

99. Rehabilitation and Incapacity Bill 1990. See also Hon. D.F. Caygill, Minister of Finance, 1989 Budget and Tables, Appendices to the Journals of the House of Representatives B6, at 13 (July 27, 1989).

would be a significant imperial conquest. Yet, it may happen.

V. COMPENSATION FOR INTANGIBLE LOSS IN NEW ZEALAND

The New Zealand scheme, from its inception until 1992, paid lump-sum compensation for loss of bodily functions, pain, suffering, and loss of enjoyment of life. The amounts were modest—a maximum of \$17,000 for loss of bodily function and \$10,000 for pain and suffering. The amounts were even less when the scheme began. These sums were included in the scheme by Parliament, against the recommendation of the Woodhouse Report, as a result of earnest representations from lawyers for trade-union interests. They argued that the Royal Commission's opposition to lump-sum payments was misplaced and that it was necessary to recognize the pain and suffering that had been part of common-law compensation. It was argued that pain and suffering were not adequately substituted for by a periodic payment system that never directly addressed the dignitary aspects of the loss nor separated them from the economic loss. These arguments prevailed.¹⁰⁰

The administration of the lump-sum compensation provisions proved, with experience, to demonstrate many of the deficiencies that the Woodhouse reformers had harbored for them. First, it proved much more expensive than had been estimated, and the amount of cost increase for non-economic loss compensation was substantial as the years progressed, despite the low maximums. The amount paid out for non-economic loss in 1991 was \$NZ 259 million more than for medical and hospital treatment combined.¹⁰¹

Part of this unexpected drain on the scheme of non-pecuniary loss compensation resulted from social developments which had not been anticipated by the framers of the policy. The changing position of women in New Zealand society, increased candor in the public discussion of matters which were previously off-limits, research findings, feminist concerns, and analysis all combined to produce a heightened awareness of sexual abuse in New Zealand. By 1991, the Corporation was paying out thirty million to fifty million dollars a year on sexual abuse claims.¹⁰² Most of these cases involved pain, suffering, and loss of enjoyment of life—psychic rather than physical injury.

100. GEOFFREY PALMER, COMPENSATION FOR INCAPACITY 89-91 (1979).

101. ACCIDENT COMPENSATION CORP., ANNUAL REPORT 47 (1991).

102. *Id.* at 13 (statement by the then-Chairman C.A.N. Beyer). However, doubt has been cast on that figure. Robin MacKenzie, *Lump Sums or Litigation? Compensation for Sexual Abuse: The Case for Reinstatement of a Compensation for Criminal Injuries Scheme*, 15 N.Z.L.R. 367, 390 (1993) (arguing that New Zealand was the first country in the world to introduce a criminal-injuries compensation scheme and, unless proper compensation for sexual abuse is available, some such scheme will have to return).

The Corporation was concerned with the impossibility of checking the veracity of these claims, and many of them had occurred a long time in the past. Even though intentional tort actions were available when there were tort claims in New Zealand, they were hardly ever claims for sexual abuse.

The availability of the lump-sum compensation for non-economic loss also provided an incentive for injured people to dwell upon their plight and acted as an obstacle to rehabilitation. A further problem arose. The legislation restricted eligibility for pain and suffering by requiring the loss to be "sufficiently serious in nature, intensity and duration."¹⁰³ Nonetheless, it became evident, over time, that too much of the money was going to those who were not at the high end of the incapacity continuum.

In 1992, the government, in accordance with original Woodhouse policy, abolished lump-sum compensation for non-economic loss. All that is allowed under the 1992 legislation is an independence allowance "where the person's personal injury has resulted in a degree of disability of ten percent or more."¹⁰⁴ The entitlement cannot begin earlier than thirteen weeks after the date of the personal injury. It must be reassessed at intervals not exceeding five years. This provision will be easier to administer than earlier provisions. It will not give a disproportionate share of the money to those with lesser injuries.

The provisions, however, cannot be said to meet the principle of real compensation—a foundation principle of the Woodhouse report. To begin with, the maximum allowance for 100 percent disability is forty dollars per week. The measurement was made under the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, but this has now been subjected to new regulations which require a series of tests to determine "functional limitation profile."¹⁰⁵ Where the degree of disability is less than ten percent, payments "shall be at such lesser graduated rates as are set by regulations made under this Act in respect of those persons with lesser degrees of disability."¹⁰⁶ The Act makes it clear that no one can receive an independence allowance unless the disability reaches ten percent.

Work done by the Law Commission for its 1988 report to the Government demonstrated that the average impairment was only 10.5 percent. Only one-

103. Accident Compensation Act of 1982, § 79.

104. Accident Rehabilitation and Compensation Insurance Act 1992, § 54.

105. Accident Rehabilitation and Compensation Insurance (Independence Allowance Assessment) Regulations 1993, to S.R. 1993/195. Cf. Accident Rehabilitation and Compensation Insurance (Independence Allowance Rates) Regulations 1992, S.R. 1992/162. Further adjustments had to be made by the complex Personal Injury Regulations 1994.

106. Accident Rehabilitation and Compensation Insurance Act 1992, § 54(4).

third of those examined had an impairment of ten percent or more, and two-thirds of 168 randomly chosen victims who had loss-of-faculty payments under the scheme as it was, had an incapacity of twenty percent or lower.¹⁰⁷ So, the threshold as first promulgated excluded about two-thirds of the people who received lump-sum compensation under the old scheme. Under the new 1993 regulations, the threshold was relaxed to a degree, but it is almost impossible for those who meet the threshold to get more than five dollars per week. One absurdity appears to have been replaced by another.

The drastic reductions have a particular impact on non-earners, the majority of whom are women. Serious questions arise concerning whether the policy can be justified under any principle at all. Certainly it is discriminatory in substantive effect. Not only does it appear that the amount will be miserly, but the amount cannot be ascertained. Further, while the entitlements are subject to alteration by regulation, constitutionally such matters should be dealt with by an Act of Parliament. It is hard to imagine a more poorly-put-together policy than this one. The same or similar methods of assessment could have been used without setting the levels of benefit at what is, in effect, intangible loss at absurdly low limits. The levels could have been much more generous without incurring financial problems for the scheme. It is already plain that the policy cannot be sustained. It is being reviewed, and it will be revised.

Common-law damages actions are not available for people covered by the scheme. For people who used to receive full reparation, including dignitary harm, how can the diminution be justified? The benefits have been cut down, and the common law remains unavailable. Corrective justice has been sacrificed for distributive justice, but not enough is now being distributed to make it fair.

Indeed, the New Zealand scheme now, with its benefits cut back, does not provide full compensation for economic loss, for pain and suffering, or for loss of enjoyment of life. New Zealand's policy is now prepared to virtually ignore intangible loss in favor of a community-average standard of compensation that is factored to the individual levels of earnings, if any, and provides only slight recompense for permanent partial and permanent total incapacity. Yet, tort cannot return to any great extent.

The lack of response to the permanent intangible losses of accident victims is one of the key problems with the 1992 legislation, and it is the analogy to common law which still controls the argument twenty years after its demise. At common law, damages were awarded once, for all past, present, and future

107. Sir Kenneth Keith, *Patients' Redress vs. Doctors' Immunity* 7 (1993) (unpublished paper available from the New Zealand Law Commission).

losses in a lump sum. In theory, common-law damages for personal injury provided full compensation for successful plaintiffs. The aim was to put the injured person in the same position as the injured person would have been had there been no accident. The largest element in any award was usually compensation for destruction of the injured person's future capacity to earn. There was an element of guesswork even here—life expectancy, future pattern of earnings, promotion prospects, future tax liability, and inflation. It was an individual assessment in every case.

The elements of uncertainty for economic loss were far fewer than the vague and speculative ingredients required for intangibles. Intangibles fell into three categories: (a) pain and suffering; (b) loss of amenities of life; and (c) loss of expectation of life. At common law, pain referred to the physical pain and discomfort that a person experienced and would continue to experience in the future. Suffering denoted a mental element and psychological trauma was suffered or is likely to be suffered in the future. The Law Commission, in 1988, explained that compensation for intangibles deals "with something that is real but not quantifiable as against specific calculable financial loss."¹⁰⁸

Two American commentators, Professors Walter Blum and Harry Kalven, put the case for intangibles in the following way:

Consider the case of the man who loses a leg in an accident; assume he makes a rapid successful adjustment, gets his job back and suffers no current pain. What is at stake in the debate over pain and suffering is whether the law is to treat him as entitled only to compensation for his medical expense plus temporary loss of income, or whether it is to try to translate into monetary terms the gross indignity he has suffered, which has surely altered his entire life.¹⁰⁹

The scope of intangible loss has expanded over the course of the twentieth century in common-law countries, as concerns with psychic well-being and feelings have increased. This issue is related to the nervous-shock issue discussed above. Professor Richard Abel has suggested that "[t]he growing importance of damages for intangible injury reflects the value system of a postindustrial society that promises everyone a perfect life, unimpaired by accidents, and elevates leisure and consumption over work and production."¹¹⁰

108. LAW COMMISSION, *PERSONAL INJURY: PREVENTION AND RECOVERY*, REPORT NO. 4, para. 190, at 57 (1988).

109. WALTER J. BLUM & HARRY KALVEN, JR., *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS* 35 (1965).

110. Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 789 (1990).

The policy problem confronting the 1992 Act is that, if no response whatever is made to these issues now that lump sums have gone, then should the common-law action be brought back for them? It is true that compensation for loss of human dignity or pain and suffering is not easy to assess. However, it is an attractive idea that resonates in the community.

Another feature of the common-law method of assessing damages was that it was tailor-made. In other words, in each case, the factors were separately considered. There was no automatic formula. For such a system to be run on a universal basis would be administratively unmanageable. The original Woodhouse report placed great emphasis on the need to use an automatic formula that would not be ungenerous to the individual concerned but that would operate with reasonable uniformity and avoid contention. The recommendation was for the ascertainment of a percentage of incapacity by reference to a schedule of severity ratings.¹¹¹ This recommendation found no favor. Objections to the recommendation relating to intangible losses led to the inclusion of the lump sums in the Act.

While I agree that there should be no return to lump-sum benefits, an appropriate response to the problem of intangible loss is required to secure the future of the scheme. The cost arguments against this cannot be controlling, although they must be seriously examined. The costs of a return to common law would be far greater for the economy as a whole than any adjustments that could reasonably be expected to be made to the existing scheme. The main burden of the existing policy should be to prevent a return to the common law. That objective is gravely at risk so long as the payments in recognition of permanent disability remain as low as they are under section 52 of the 1992 Act.

The Woodhouse inquiry in Australia addressed anew the non-pecuniary-loss issues and their relationship to earnings loss and designed a different method for handling the difficult cases. The technique there was to produce a medical assessment of the impairment, based on use of the American Medical Association *Guides to the Evaluation of Permanent Impairment*.¹¹² For permanent partial incapacity, the rate of benefit was fixed by applying the percentage of impairment against eighty-five percent of the average weekly earnings in the community. For example, under the *Guides*, a person who was twenty percent impaired would get twenty percent of the amount equal to eighty-five percent of the average weekly earnings. In the event that the person was a non-earner, the calculation would be made on the basis of sixty percent of the

111. REPORT OF THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND, para. 303-04, at 122-23 (Dec. 1967).

112. AMA, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (4th ed. 1993).

average weekly earnings.¹¹³

When the Australian Senate Committee analyzed the Bill on this basis, it found that there were many criticisms. The primary one was that a blue-collar worker who lost a leg would receive the same benefit as a white-collar worker, whereas the latter may suffer no reduction in earnings at all. In other words, a one-legged judge would receive a much higher income than a one-legged laborer because the judge would continue to receive full earnings. Discretion was available in the Bill as introduced to deal with this, but, upon scrutiny, it lacked credibility.

113. 1 REPORT OF THE NATIONAL COMMITTEE OF INQUIRY, COMPENSATION AND REHABILITATION IN AUSTRALIA, pt. I, ¶¶ 400-01; pt. II, cls. 35-36 (July 1974). Professor T.G. Ison explained the Australian proposals in the following way:

A possible reform might be to adopt the formula proposed in the *Woodhouse Australian Report*. The committee there recommended a physical impairment method using a single schedule to compensate for all monetary and non-monetary losses. The schedule would be a catalogue of impairments of body function, to each of which would be assigned a percentage of total disability. The resulting percentage rate would be applied not to the previous earnings of the claimant, but to the index of average weekly earnings.

This proposal does not abandon the objective of earnings related compensation. Rather it is a sagacious method of seeking that objective. Indeed, its simplicity may well make it more successful in achieving that objective than other more complicated and less subtle methods.

Consider the examples of:

A. an architect earning \$34,000 a year; and

B. a laborer earning \$9,000 a year.

Both are aged 40, and they each lose a leg in a motor vehicle accident. Their medical conditions are similar. Assume that the schedule indicates a percentage rate for those conditions of 55%. Assume that the average wage is \$12,000. As compensation for permanent partial disability, they would each receive 55% [of] 85% of \$12,000, that is \$5,610 a year.

For each of them, this may well be fair and reasonable compensation. The architect may well suffer some impairment of social and domestic activity, some increase in mobility expenses, and a slight reduction in the range of work that he can undertake; but the disability may not have more than a marginal effect on his income. The laborer, however, may have to move from unskilled active work to unskilled sedentary work, and his earnings may drop substantially.

The essence of the proposal is that people at the lower end of the income scale depend on physical fitness for their incomes to a much greater extent than people at the upper end. Applying an impairment percentage rate to the average wage is, therefore, more likely to reflect actual loss of earning capacity than applying that percentage rate to previous earnings.

The committee qualified this recommendation by adding an exception that actual previous earnings should be used if a claimant could show that the use of average earnings would result in under-compensation.

TERENCE G. ISON, ACCIDENT COMPENSATION 56 (1980) (footnotes omitted).

Following a lengthy and detailed debate in the policy-making circles of Australia on this question, the Australian Government decided that the solution was to base permanent-partial-incapacity benefits on a loss of earnings as of right, rather than of discretion, where loss of earnings exceeded the amount of the benefit produced by the formula. In other words, the injured person had the option: either actual lost earnings, or the formula. These measures were regarded by the Leader of the then Labour Government in Australia, the Honorable E. G. Whitlam, with great favor. Following the fall of his government, he introduced them as a Private Member's Bill to the House of Representatives in Australia in 1977.¹¹⁴

The 1988 Report of the Law Commission in New Zealand made extensive use of the Australian work. A systematic effort was made to investigate the option's practicability. To this end, the method was applied to a randomly chosen group of 168 people who had been assessed for lump-sum payments for physical impairment.¹¹⁵

Clause 25 of the Law Commission's Draft Bill provided:

Benefit in respect of permanent partial incapacity

- (1) Subject to subsections (2) and (3), benefit is payable to a person in respect of permanent partial incapacity at the weekly rate (if any) ascertained under section 47.
- (2) A person who considers that the benefit (if any) payable under subsection (1) does not fairly represent that person's loss of earning capacity as a result of the permanent partial incapacity may apply to the Corporation for a determination of the weekly rate of benefit that would be payable to him or her under section 48.
- (3) If the weekly rate of benefit ascertained in respect of a person under section 48 is higher than the rate (if any) ascertained in respect of that person under section 47, benefit is payable to that person at the rate ascertained under section 48.¹¹⁶

Clause 47 provides for a permanent-partial-incapacity benefit based on the degree of impairment ascertained. The benefit is computed by applying the percentage of incapacity, ascertained in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, against eighty

114. GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY* 427-29 (1979).

115. LAW COMMISSION, *PERSONAL INJURY: PREVENTION AND RECOVERY*, REPORT NO. 4, paras. 195-205, at 58-62 (1988).

116. *Id.* at 119.

percent of the average weekly earnings in the community.¹¹⁷ Thus, if a person suffered amputation of a lower leg above the knee joint and was left with a short stump of three inches or less, the percentage of impairment should be forty percent under the *AMA Guides*. The person would receive a periodic payment based on forty percent of the amount, which is eighty percent of the average weekly earnings.¹¹⁸ In November 1993, average weekly earnings in New Zealand were \$558. Such a benefit would, at current levels, amount to \$178.56. For a non-earner with the same injury, it would be \$133.90. It would be paid regardless of the earnings loss unless the earnings loss were greater, in which case eighty percent of the actual earnings loss would be the compensation.

Permanent awards under this approach contain both elements of economic loss and non-economic loss. From a practical point of view, they cannot be separated in many instances. The greatest criticism of this proposal is that high earners, who require complete bodily integrity to generate their earnings, will be getting little or nothing for intangible loss. There is no way, however, that this can be rectified without going to tailor-made assessments in every case. The aim has to be fairly, broadly gauged justice.

The method of assessment for permanent incapacity has an important and dynamic relationship to medical and social rehabilitation. The ACC in New Zealand has in recent months adopted a Case Management approach to its clients. In relation to the seriously incapacitated, the approach suggested here will allow the Corporation to both keep an eye on those who are either off work or seriously incapacitated for a long time, and ensure that they receive rehabilitation to the maximum extent to which they can benefit from it.

There really does need to be a concerted effort to assess individuals' degree of incapacity. Otherwise, they remain on the scheme indefinitely by simply receiving renewed certificates from their medical practitioners stating that they cannot work. This does not help them or the scheme. The development of sophisticated multiple disciplinary assessment teams for the seriously incapacitated is an essential priority. This way—after two years, for example—people who have been on the scheme can be examined thoroughly and their position assessed. If more treatment is needed, it can be secured. Indeed, for most people, the rehabilitation effort has to be within the first three months of incapacity to be optimally successful.

The development of assessment centers would also allow a degree of uniformity to emerge in the assessment of permanent incapacity. Under the

117. *Id.* at 129.

118. The average, ordinary time, weekly wage (all sectors, all persons) as disclosed by the quarterly employment survey of salaries and wages conducted by the Department of Labour.

approach suggested here, important judgments about the application of the American Medical Association *Guides* are required. These assessments will best be handled by teams who develop expertise and experience in the issues.

Thus, the assessment of permanent incapacity and the payment of a permanent benefit is a serious issue. If the compensation is to be permanent, the community is entitled to an assurance that the incapacity is permanent. Before that decision is made, every effort must be made to rehabilitate the person as far as possible. The development of assessment centers, to which people who are seriously injured are routinely referred for both rehabilitation and assessment, could be a most important development in making New Zealand's Accident Compensation Scheme more successful. There should be very few people, indeed, who remain on the scheme at the end of two years without an assessment of their permanent incapacity. This means that people can either be put on a permanent periodic pension to the degree that they are incapacitated, or removed from the scheme.

The approach developed in Australia and by the New Zealand Law Commission in 1988 should be refined further and financially evaluated. One advantage of the proposed approach is that it directs substantially more money to the two percent of accident victims who are badly hurt. However, the approach contains cost offsets in that those who have no permanent incapacity and should not be on the scheme will be moved off it more quickly. Thus, the costs should be manageable, and they can be adjusted by reference to the indices chosen and the percentage of impairment.

The principal elements of the suggested approach are:

- (a) use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (with adjustments in some areas, such as disfigurement and head injuries);
- (b) application of the percentage of incapacity derived from the *Guides* against a flat-rate index to produce a weekly rate of compensation;
- (c) where the result of (a) plus (b) does not meet the actual earnings loss, then eighty percent of the lost earnings;
- (d) the above approach can be applied to all permanent cases;
- (e) in order to deal with the problem of people remaining on the scheme for a long time at eighty percent of lost earnings, all cases should be assessed for permanent incapacity within two years;
- (f) permanent assessments, once made, probably should not be reduced, and they should be paid regardless of future earnings; and

(g) the taxation implications may need examination.

Compensation for permanent incapacity, especially permanent partial incapacity, is the most conceptually difficult problem of compensation law. To provide a system which is both fair and administratively workable is a difficult policy assignment. The foregoing analysis is an attempt to provide a framework which satisfies both the requirements of fairness and practicality.

The striking feature of the design issues, however, is the power that common-law-damages analogies exert over the nature of the replacement. It would be a much simpler arrangement from every point of view to simply replace income loss and leave other losses where they fall. In a range of situations, such a response seems inadequate. It does not deal with the problems of non-earners who are justified in asking why they cannot sue, if they get little from the scheme. It fails to respond to the real hurt and psychic harms of sexual abuse, for example, in which there is keen community interest.

For example, a sexual abuse case involving marital rape received the maximum award of \$10,000 under the 1982 legislation.¹¹⁹ In this case, the claimant had suffered "significant long term effects from the abuse within her marital relationship."¹²⁰ While burns and scarring may cause no income loss, there is a real feeling of injustice if there is no compensation. The issue is comparability with the common-law damages. It does not have to be the same amount, but there needs to be a response to some factors. As an early decision of the New Zealand Court of Appeal stated: "The general aim has been described as being, not to grant complete restitution, but to cushion the results of accident injury by providing substantial but not total restitution."¹²¹

The experience in New Zealand with lump sums for non-pecuniary loss over twenty years shows that the intangible elements of accidents are real, and there must be a response to them. That is not to say that the response should be through lump sum compensation. The conclusion, once again, is that the common law speaks to the policy, even after its destruction.¹²²

119. *I v. Accident Compensation Corp.*, [1993] N.Z.A.R. 449. It should be emphasized, however, that under the 1992 legislation, sexual abuse is one of the few categories for which compensation for mental injury remains.

120. *Id.* at 454.

121. *Accident Compensation Corp. v. Nelson*, [1979] 2 N.Z.L.R. 464, 466 (C.A.) (Cooke, J.).

122. A similar analysis concerning the analogical power of the common law in New Zealand's accident compensation scheme could be made in respect of the 1992 Act's treatment of medical malpractice. In that legislation, there is an elaborate statutory definition of medical misadventure. In order to qualify as misadventure, an event must comprise either medical error or a medical mishap. Medical error is negligence—the failure of a registered health professional "to observe a standard of care and skill reasonably to be expected in the circumstances." *Accident Rehabilitation*

VI. LESSONS FOR THE UNITED STATES

What, you may ask, does all this have to do with the United States? The connection is more direct than it might appear. I have suggested that the New Zealand experience in reforming the law of torts suggests that account must be taken of the profile of the tort remedy provided by the common law, as to both the range of events covered and the type of compensation awarded. The features of the substitute system do not have to be identical with tort law, but they do have to be sufficiently comparable to make the new scheme politically salable and genuinely acceptable. It is along that axis that the benchmark of credibility is established for reform proposals. Almost all the reforms which have been proposed invite the comparison. There are, of course, other factors which go into the equation as well, cost being the most important factor.

Following the above logic, in order to make a convincing case that tort law must go, reformers in the United States have felt compelled, in the same way as the initial New Zealand approach, to offer schemes which make relatively generous payments and can be said to cover everyone, not just those injured by fault. Yet, the nature of the American tort system makes that aim very difficult to accomplish. As one American analyst has concluded: "As I survey specialized administrative schemes that have been adopted and proposed, the general inadequacy of compensation levels remains their most striking feature."¹²³

The trade-offs are offered on the basis that the overall utility to society is increased—more victims are paid, they do not have to prove fault from which massive savings result, and overall, everyone is better off. It is true that claims that every individual victim will be financially better off cannot be convincingly made. However, judged in the broad spectrum, the reforms provide a better set of arrangements than tort.

While rational analysis may well conclude that society would be better off with a substitute for tort as a means of dealing with personal injury, convincing both a legislature in opposition to vested interests and skeptics has proved to be a formidable task which has not met with great success. There have been some

and Compensation Insurance Act 1992, § 5. The insertion of a negligence test within the framework of a no-fault compensation scheme is surely a remarkable illustration of how far the common law exerts influence twenty years after its removal. The purpose of the convoluted and probably unworkable malpractice coverage in the 1992 legislation appears to be to avoid the scheme expanding into disease at the same time as preventing common-law actions against the medical and related professions in almost all situations.

123. Marc Feldman, Essay, *The Intellectual Ordering of Contemporary Tort Law*, 51 MD. L. REV. 980, 1010 (1992).

inroads made on the tort system in the United States by automobile no-fault plans. In addition, there are a number of specialized schemes which have developed in response to problems in particular subject areas, such as the Price-Anderson Act which creates strict liability for nuclear accidents, the National Childhood Vaccine Injury Act of 1986 which provides no-fault coverage for children hurt by government mandated vaccines, and the black lung compensation scheme.¹²⁴ There are ceilings on the amounts that can be recovered in most of the substitutes. Someone has to pay for the new schemes, and it requires legislative compulsion for them to work.¹²⁵

There is another way in which the substitute schemes can be made superior to the common law. Common law is a single-payment, lump-sum system. A system which makes its payments periodically with no time limit can, from an actuarial point of view, be demonstrably superior to the common law award if benefits are adjusted periodically for inflation.¹²⁶ Damages law in the British Commonwealth prevents account being taken of future inflation.¹²⁷

In more recent years in the United States, there has been a concerted movement to reform some of the internal rules of tort without dismantling the entire edifice. This move appears to have been in response to the alleged insurance crisis in the mid-1980s.¹²⁸ Forty-eight states passed legislation between 1985 and 1988 reforming aspects of tort law.¹²⁹ Changes included modification of the collateral-source rule, the introduction of the principle of comparative negligence, control over contingent fees, caps on damages, changes to the rules on joint and several liability, and limits on punitive damages awards.¹³⁰ Furthermore, there has been a reduction in the judicial expansion of tort law in the last few years.¹³¹ While the pressures to reform tort law in the United States seem to wax and wane over time, there would appear to be

124. For details of these schemes, see MARC A. FRANKLIN & ROBERT L. RABIN, *CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES* 773-87 (5th ed. 1992).

125. Walter J. Blum & Harry Kalven, Jr., *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341.

126. 1 REPORT OF THE NATIONAL COMMITTEE OF INQUIRY, COMPENSATION AND REHABILITATION IN AUSTRALIA, ¶¶ 149-50 (July 1974).

127. JOHN G. FLEMING, *THE LAW OF TORTS* 231 (8th ed. 1992).

128. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY, Feb. 1986 (U.S. Gov't Printing Office, 1986, 491-510:40090).

129. Joseph Sanders & Craig Joyce, "Off to the Races": *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 218 (1990).

130. *Id.* at 220-22.

131. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 700 (1992). After a very careful and convincing analysis, Professor Schwartz concludes that the recent period has been one of "stabilization and the mild contraction of doctrine." *Id.*

little prospect in the immediate future of making further significant inroads upon tort law.

The phenomenon of a body of law that is so intellectually incoherent and so heavily criticized surviving against repeated assaults demands attention. Why is it so? Is the explanation to be found in the nature of the separation of powers in the United States and “demosclerosis” induced by the actions of special interests?¹³² Or is it in the deeper nature of the American political culture, which eschews government and views the prospects of making significant payments to injured people as contrary to the American way, especially when their own actions may be responsible for their predicament? Despite social security and workers’ compensation being well accepted, there seems to be extraordinary resistance in the United States to social insurance ideas under which injured people would recover from a public fund. Yet that does not seem altogether satisfying as an explanation when one considers the vast sums of government money expended upon bailing out savings and loan associations and paying farmers not to produce. While the American rhetoric is in favor of free markets, the actual practice is far from implementing them at a practical level.

In ordinary cost-benefit analysis, one would have thought that the case for abolishing the tort system was overwhelming. The benefits which come from the system are exceeded by its costs and disadvantages. The injury industry, no doubt, is a powerful vested interest within the American polity. Undoubtedly, people who are parasitic upon the system, such as plaintiffs’ attorneys and the insurance industry, will wish to continue to suck blood from it. However, their interest can hardly be seriously regarded as part of the public-interest equation as politicians seem to have regarded it within the United States.¹³³

132. JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT 110 (1994). After criticizing the tort system, Rauch observes that

[i]n the context of transfer-seeking, litigation is a cousin of lobbying. In both kinds of activity, the system is supposed to provide fair compensation or serve society’s larger interests, but it necessarily also creates opportunities for redistributive entrepreneurship and profit hunting; in both, the parties on all sides wind up feeding middlemen and hiring expensive professional agents

Id.

For a related view of what ails the United States political system, see KEVIN PHILLIPS, ARROGANT CAPITAL (1994), which also stresses the domination of special interests and the remoteness of the decision-maker in Washington from the grass roots. *Id.* at 19. Phillips also stresses the excessive role of lawyers, and the need to curb the litigation and liability explosion. *Id.* at 198-99.

133. In the first article I ever wrote on tort reform, I explained:

Such plans, especially those of the more radical variety, are likely to be politically controversial everywhere. The more comprehensive the plan, the wider the range of interests which stand to be hurt by its implementation. Lawyers and insurance companies have, or think they have, an important stake in the common law *status quo*.

Tort is a loose body of law capable of being maintained in its present form only because it is applied by juries. Why trial by jury in civil cases in the United States is retained when so many other countries have rid themselves of it is another puzzle.¹³⁴ Indeed, Professor John Fleming has pointed out that the real differences in tort law between the United States and other common-law countries lies not in the legal doctrine, but more in the "unique institutional arrangements" which have grown up around the system.¹³⁵ Apart from retention of juries, other features of the American system which are striking to someone from the British Commonwealth are contingent fees, class actions, consolidations leading to mass tort litigation, the relative ease of securing punitive damages awards, virtually non-existent standards for valuing non-pecuniary losses, an extraordinary propensity to sue doctors, the failure of legislatures to do very much of anything, the invention of product liability by judicial decision, the techniques of trial lawyers, the lobbying activities of the American Trial Lawyers Association, and the absence of an English rule about party and party costs in litigation. Almost all these features have the effect of making common-law-damages awards higher and, consequently, making no-fault substitutes much harder to design.

These groups and others which tend to oppose root and branch reform of personal injury compensation are important and influential sources of political power in most Western societies. When faced with strong opposition from such groups, politicians feel that they are running substantial political risks if they move to overthrow existing compensation arrangements.

Geoffrey Palmer, *Abolishing the Personal Injury Tort System: The New Zealand Experience*, 9 ALBERTA L. REV. 169, 170 (1971). For America, that is an understatement.

134. I am not oblivious to the provisions on the matter in the United States Constitution or in the many state constitutions. But the issue never even seems to be discussed.

135. JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 31 (1988). I have thought at various times that the doctrinal developments of the American courts in tort law were far bolder and expansionary than any to be found in the Commonwealth. But expansion in the 1990s seems to be in eclipse. In 1978 I wrote:

Despite widespread support for the rhetoric of individual responsibility in the United States, the expectations of Americans concerning what their governments might do for them have changed dramatically in the last fifty years. If one examines what American governments actually do, it becomes apparent that a great deal more government intrusion is tolerated than inspection of the rhetoric would suggest. So strong have the pressures for more government intervention become that the courts have not been immune from them. The tension between the demand for government intervention and the traditional suspicion of government appears to have led to covert and indirect social engineering by the courts. The tendency shows up in cases involving compensation for personal injury.

Geoffrey Palmer, *Social Engineering in New Zealand and the United States: A Comparison of Approaches to Tort Reform*, 4 WM. MITCHELL L. REV. 315, 316 (1978). See also John J. Farley III, *Robin Hood Jurisprudence: The Triumph of Equity in American Tort Law*, 65 ST. JOHN'S L. REV. 997 (1991).

It is not surprising that tort law, as practiced in the United States, is controversial. I have taught the law of torts ten times to American law students spread over a period of exactly twenty-five years. I never fail to be shocked by its excesses, its lack of principle, and its social disutility.¹³⁶ How it can be tolerated, I have never understood. In that twenty-five year period there are areas in which tort law “appears to have most notably been transformed,”¹³⁷ but nothing, I think, can be said to have improved it much from my angle of narration. For me, teaching American torts excites the sort of enjoyment people get from going to horror movies.

Not that the American academic community seems at all united about the deficiencies of tort.¹³⁸ A considerable academic industry has developed in the United States concerning tort law. To some degree, new life of a conservative cast has been breathed into tort law by the law and economics industry. Legal philosophers attracted by its doctrinal incoherence have dealt with the corrective justice and moral aspects of tort. Critics have also been active in the field. By and large, however, my impression is that while “[t]orts scholars should be resting uneasily in their bed,” most are not.¹³⁹ The academic community in the United Kingdom, for example, has been much more hostile to torts than their colleagues in America even though the English tort system is much more mild-mannered and of less relative significance in the social support system than

136. I do not teach torts at all in New Zealand. Teaching torts—especially negligence—without personal injury is like playing Hamlet without the Prince. Is this a factor which may influence the attitude of the American academic community to reform?

137. Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1 (1988).

138. A diverse sampling of the range of views is contained in the Tort Reform Symposium in a recent edition of the *San Diego Law Review*: Kenneth S. Abraham et al., *Enterprise Responsibility for Personal Injury: Further Reflections*, 30 U. SAN DIEGO L. REV. 333 (1993); Alfred F. Conard, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfers from the Innocent*, 30 U. SAN DIEGO L. REV. 283 (1993); Virginia E. Nolan & Edmund Ursin, *Foreword, Symposium on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 U. SAN DIEGO L. REV. 213 (1993); Jeffrey O'Connell & Chad M. Oldfather, *A Lost Opportunity: A Review of the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 U. SAN DIEGO L. REV. 307 (1993); Jerry J. Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 U. SAN DIEGO L. REV. 241 (1993); Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 U. SAN DIEGO L. REV. 263 (1993); Marshall S. Shapo, *An ALI Report Markets a Defective Product: Errors at Retail and Wholesale*, 30 U. SAN DIEGO L. REV. 221 (1993); Marshall S. Shapo, *Rejoinder: Advances in the Analysis*, 30 U. SAN DIEGO L. REV. 365 (1993).

139. Jeffrey O'Connell & David Partlett, *An America's Cup for Tort Reform? Australia and America Compared*, 21 MICH. J. L. REF. 443, 445 (1988).

its counterpart in the United States.¹⁴⁰

Since torts is a required first-year course in almost all American law schools, I suspect that most teachers attempt to teach the internal elements of tort doctrine and the administration of tort principles in the courts, rather than question the social premises upon which the edifice is based. The quirks and puzzles of tort are sufficiently fascinating without going to the trouble of dealing with broad policy issues. Indeed, the American approach to tort law has been replete with what Professor Ernest Weinrib called instrumental approaches to tort law, a case powerfully developed in this very Lecture in 1989.¹⁴¹

Of such modest relevance as the New Zealand experience is to the United States, it does teach that pursuing large-scale reform requires more attention to the configuration of the common law system than was articulated in the original New Zealand blueprint for reform. Hewing a line close to the common-law configuration is particularly difficult in American reform efforts, given the manner in which damages have developed and the preference for private-enterprise solutions which are necessarily more costly than centralized state-funded solutions. The comparisons between the tort system and the substitutes become too unattractive, the disparities too great, and the trade-offs uncompelling. In the United States, it may well be impossible to design a compensation scheme that will be sufficiently comparable to the common law to be accepted. If tort law rules to this extent, then it would be preferable to collapse the entire edifice and put nothing in its place.

It can be strongly argued that, in its reduced state, the New Zealand scheme, since 1992, is like an extended workers' compensation scheme with some additions and is just not sufficiently generous for the public to accept. There have been widespread demands for the restoration of lump sums for non-economic loss, and, given the reduced nature of the benefits, there have been calls for a return to the right to sue.

Workers' compensation statutes typically make no response to dignitary loss, although they do provide scheduled compensation for loss of bodily function.¹⁴² Suggestions have been made in the United States to extend workers' compensation to non-occupational injuries.¹⁴³ However, such

140. JOANNE CONAGHAN & WADE MANSELL, *THE WRONGS OF TORT* (1993); Donald Harris, *Can the Law of Torts Fulfill Its Aims?*, 14 N.Z.U.L. REV. 113, 122 (1990). Harris concludes: "The overall conclusion must be that tort law has a very limited role in modern society." *Id.*

141. Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

142. IOWA CODE § 85.34 (1993).

143. Roger C. Henderson, *Should Workmen's Compensation Be Extended to NonOccupational Injuries?*, 48 TEX. L. REV. 117 (1969).

suggestions have not been adopted. In the United States, workers' compensation is a private enterprise method of responding to the accident problem. Social Security, as a publicly funded and administered scheme, would be another vehicle through which to address the issues. There is now some modest protection by way of the Old Age, Survivors, and Disability Insurance program and a supplementary scheme for the aged, blind, and disabled.¹⁴⁴

However, folding the American tort system into either of these programs just does not have any support. I suspect that this is partly because of the comparative compensation aspects of the common law for those who can secure it. Further, it simply does not seem attractive in these American times, which are distinctly not progressive, to create new laws, new bureaucracies, and more government involvement in areas where extended government involvement does not attract a community consensus.

One of the prime issues any such American tort replacement system has to deal with is medical costs. Without the back-up of a health program with universal coverage, it is hard to reform the tort system. In 1994, solutions to that problem in the United States do not seem to be close at hand, despite a lot of political heavy-lifting designed to produce a solution.

Various elective no-fault plans have been advanced by that indefatigable critic of the tort system, Professor Jeffrey O'Connell.¹⁴⁵ Yet, as far as I can tell, these do not seem to have had much of a practical impact on the tort system so far. The progress of no-fault automobile legislation seems to have halted in recent years. The problems caused by an explosion of medical malpractice and products liability litigation seem to continue unabated, lessened somewhat by the internal rule changes made to the tort system by legislatures.

My own conclusion about the efforts made to reform the tort system in the United States over the past thirty years is that they have fundamentally failed. There is less likelihood of success now, it seems, than there was in 1965, when the modern reform effort started with the publication of the no-fault auto plan by Professors Keeton and O'Connell. Professor Stephen Sugarman made a

144. W. PAGE KEETON ET AL., *TORT AND ACCIDENT LAW* 911-17 (2d ed. 1989).

145. See, e.g., Jeffrey O'Connell, *Balanced Proposals for Product Liability Reform*, 48 OHIO ST. L.J. 317 (1987); Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898 (1985); Henson Moore & Jeffrey O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 LA. L. REV. 1267 (1984); Jeffrey O'Connell, *Offers that Can't be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U. L. REV. 589 (1982); Jeffrey O'Connell, *An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries*, 60 MINN. L. REV. 501 (1976).

valiant attempt to do away with it all in his 1989 book.¹⁴⁶ Notwithstanding these and other heroic efforts, I sense a mood of disillusionment about the prospects of taming the beast.

The goals of tort law have been variously developed as some combination of the following:

- compensation of injured people;
- the deterrence of dangerous behavior;
- the achievement of corrective justice between the parties;
- the spreading of losses via a system of liability insurance;
- the achievement of economic efficiency; and
- an Ombudsman and educative function.¹⁴⁷

None of these goals of tort law appears to me to be achieved in a satisfactory manner capable of empirical verification. Indeed, it is far from clear that a series of multiple goals can be achieved by any system like the American tort system, and the pursuit of multiple goals may well be an obstacle to the achievement of any goals. A generation of fervent discussion within the United States about tort law and its reform has produced only modest substantive change.

The performance of the tort system itself suggests a powerful case for abolition.¹⁴⁸ The transaction costs of the system are scandalously high. The United States Transportation Department conducted a study which found that it costs \$1.07 in expenses to deliver \$1.00 in benefits to the victims of automobile accidents.¹⁴⁹ Another authority has calculated that only 14.5 cents of every automobile bodily injury liability insurance premium dollar goes to compensating losses of victims which are not otherwise compensated.¹⁵⁰ Automobile accidents probably account for about half of all tort claims. A 1986 study for the Institute of Civil Justice, carried out by the Rand Corporation, found that

146. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* (1989).

147. ALLEN M. LINDEN, *CANADIAN TORT LAW* 20 (4th ed. 1988). For a more ambitious institutional analysis of tort law, see Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23 (1990).

148. The findings of the Harvard Medical Practice Study Group, *PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK* (1990), suggest to me that the system has formidable problems. See also PAUL C. WEILER, *MEDICAL MALPRACTICE ON TRIAL* (1991). There is enough money in the malpractice system to support a good no-fault system.

149. U.S. DEPT. OF TRANSPORTATION, *AUTOMOBILE INSURANCE AND COMPENSATION STUDY, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* 51 (1971).

150. W. PAGE KEETON ET AL., *TORT AND ACCIDENT LAW* 828 (2d ed. 1989).

tort expenditures in 1985 in the United States totalled between \$29 and \$36 billion.¹⁵¹ Of that, plaintiffs received "about \$14 to \$16 billion, in net compensation after deducting all the litigation costs."¹⁵² If the value of the plaintiffs' time is added, only forty-six percent of total expenditures on the tort system was received by plaintiffs as net compensation.

In some areas, the system performs worse than it does on average. Paul Weiler estimates that the existing malpractice system spends roughly fifty-five to sixty cents to deliver between forty and forty-five cents into the hands of injured parties.¹⁵³ The transaction cost argument cannot be justified in any way I can see. It costs about seven cents to deliver a dollar of benefits under the New Zealand scheme. The tort system is a colossal waste of money for no good reason. The reasons to justify such misapplication of resources need to be powerful, but, in the case of the tort system, they are exceedingly thin.

The deterrence objective, which has spawned great debate and no agreement, seems to me no better satisfied by the American tort system than the compensation objective. There simply does not exist any unambiguous evidence that the tort system has significant deterrent effects, whether directly or within its modern law and economics garb.¹⁵⁴

The corrective justice justification for torts does not even convince law students. There have been so many instrumentalists at work in the field of torts attempting to suffuse it with other purposes that it cannot be said in the modern insurance context in which the system lives that it satisfies a sense of justice between the injurer and the injured. Tort law as a public educator seems ineffective. At best, this is a make-weight argument.

The succinct conclusion of Professor Stephen Sugarman cannot be improved upon:

Current personal injury law is failing. It is incomplete as a compensation device, terribly wasteful of legal and other resources, doubtful as a promoter of safety, the probable cause of significant socially and economically undesirable conduct, and generally unsuccessful as a

151. JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION at ix (Inst. for Civil Justice, Rand Corp. 1986).

152. *Id.*

153. PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 53 (1991).

154. Don Dewees & Michael Trebilcock, *The Efficacy of the Tort System and Its Alternatives: A Review of Empirical Evidence*, 30 OSGOODE HALL L.J. 57 (1992).

mechanism for doing justice between injurers and victims.¹⁵⁵

The advocates of law and economics, infused with a sort of messianic zeal, seek to justify the tort system on the grounds of efficiency. The vigor with which the idea has been pursued is out of all proportion with either its explanatory power or its demonstrable economic advantages. It may well be that the most efficient solution of all is to abolish all the liability rules and let the losses lie where they fall. If one is serious about market solutions, this may be the route to take.

I venture the opinion that the solution to the United States tort problem is in fact to abolish tort as a means of dealing with personal injury and to put no mandatory statutory substitute in its place. As far as I can see, no one has previously suggested this, but, as a package, it could be made quite attractive in terms of the savings of costs for business, the economy, and judicial resources. No comparison with substitutes is necessary, and the unfairness of the present forensic lottery disappears. Accepting that the nature of the replacement cannot be agreed upon now, it would be better to start again. If personal injury were treated like fire insurance, a number of good things may happen. People could either insure or not insure. If the law afforded no prospect of relief, then a number of disparate and creative means of addressing the problem would be likely to spring up. The economic advantages of such a move may be substantial. No longer would money be poured into an unprincipled and grossly wasteful system.

If collective solutions were required, the need for them would be much more obvious if the tort system were abolished. In its relative generosity for a few, the tort system masks the injustice for many and the failure to respond to a widespread social problem created by injury. Sometimes reform must be radical to work. Americans seem to have forgotten how to reform, especially in social matters.

VII. CONCLUSION

In the United States in 1993, there were 90,000 deaths and 18.2 million disabling injuries attributable to accidents¹⁵⁶ or, what the National Safety Council began calling in 1994, "unintentional injuries."¹⁵⁷ Indeed, the numbers of injuries and deaths from this source increased in 1993 for the first time in five years. For the whole population, accident is one of five principal

155. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* 211 (1989).

156. NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS* at iii (1994).

157. *Id.* at 1.

causes of death. Accidents are the leading cause of death up until the age of about forty. The good news is that life is safer than it used to be. The trend has been downwards most of this century. While things like falls (13,500) and firearms (1600) cause a significant number of deaths, nothing can match the death-dealing power of the automobile, which accounts for 42,000 of the deaths. The home produced a total of only 22,500 deaths, and work accidents caused 9100 deaths.

Contemplating these facts, no one in their right mind would devise anything resembling the tort system as a means of dealing with the problem. Thus, I reason that if the existing system were abolished, it may lead to some rational analysis of how better to handle the problem from first principles. New responses would be found to old problems and fresh solutions devised. Americans are good at improvisation and pioneering. Abolition of the tort system would release their creative endeavors and help lead to a more just society.

The most obvious response to my proposal is that, since reform with substitutes for tort law could not be achieved in the United States, the political feasibility of abolition without substitutes is not possible. Politics is the art of the possible, and it will be said that sufficient support could not be generated for the approach. I am far from convinced this is the case. Straight abolition with no mandated substitute changes the dynamic of the reform. Insurers, manufacturers, and others can then see a whole different range of possibilities available for filling the gap by private initiative. Governments see substantial savings in judicial and court resources. Creative forces are unleashed and resources freed up. Almost anything would be better than the American personal-injury tort system. Until American reformers change their focus, the tort system will continue to limp along, a discreditable social institution propped up by forces of privilege whose motives cannot survive scrutiny. Before anything good can happen, the beast must be slaughtered.

